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No. ___

IN THE
Supreme Court of the United States

DAVID H. MILLS, Director of the Indiana Department of Financial Institutions,

Petitioner,

v.

MIDWEST TITLE LOANS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Commerce Clause permit a State to regulate consumer loans to its residents by a firm that advertises and conducts multiple loan-related activities in the State, but that requires all loan agreements to be signed in another State?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 8

I. The Decision Below Conflicts With Decisions of Other Circuits Permitting States to Regulate Loans Issued in Other States to Their Citizens 9

II. The Question Presented Warrants Review Because Many States Regulate Interstate Loans Amidst an Escalating Consumer Debt Crisis 14

III. The Court Below Erroneously Relied on Price-Affirmation Cases and Thereby Created New Tension Between Commerce Clause and Due Process Doctrine 20

A. *Brown-Forman* and *Healy* Do Not Stand for the Rule Applied Below 21

B. A more deferential standard applies to laws that affect commerce in other States while protecting against injuries at home 24

C. Because due process plainly permits one State's law to apply to a financial contract signed in another state, the decision below creates tension in the law of extraterritorial application 26

1. Due process analysis permits extraterritorial regulation based on a range of state connections 27

2. The Seventh Circuit acknowledged that it was diverging from standard choice-of-law principles 31

CONCLUSION 35

APPENDIX 1a

Opinion of the United States Court of Appeals for the Seventh Circuit 1a

Final Judgment of the United States Court of Appeals for the Seventh Circuit 20a

Corrected Entry Granting Plaintiff's Motion for Summary Judgment and Permanent Injunction issued by the United States District Court, Southern District of Indiana 21a

Judgment of the United States District Court, Southern District of Indiana 45a

Joint Stipulation of Facts 48a

TABLE OF AUTHORITIES

CASES

Adventure Communications v. Kentucky Registry of Election Fin., 191 F.3d 429 (4th Cir. 1999) 30

Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977) 9, 11

Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975) 8, 9, 10, 17

Aldens, Inc. v. Ryan, 571 F.2d 1159 (10th Cir. 1978) 9, 11

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 27, 29

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 30, 32

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986) 21, 22

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 25

Cash in a Flash, Inc. v. McCullough, 853 N.E.2d 533 (Ind. Ct. App. 2006) 4

CASES (CONT'D)

Edgar v. MITE Corp.,
457 U.S. 624 (1982) 24, 25, 30

Gerling Global Reinsurance Corp. of Am. v. Gallagher,
267 F.3d 1228 (11th Cir. 2001) 30

Healy v. Beer Institute,
491 U.S. 324 (1989) 20, 22, 23, 24

Home Insurance Co. v. Dick,
281 U.S. 397 (1930) 29

Kaneff v. Delaware Title Loans, Inc.,
587 F.3d 616 (3d Cir. 2009) 12, 20

Midwest Title Loans, Inc. v. Mills,
593 F.3d 660 (7th Cir. 2010) 1

Midwest Title Loans, Inc. v. Ripley,
616 F. Supp. 2d 897 (S.D. Ind. 2009) 1

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 32

National Bellas Hess, Inc. v. Dep't of Revenue,
386 U.S. 753 (1967) 33

National Paint & Coatings Ass'n v. City of Chicago,
45 F.3d 1124 (7th Cir. 1995) 25

CASES (CONT'D)

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 24

Quik Payday, Inc. v. Stork,
549 F.3d 1302 (10th Cir. 2008) 13, 18

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 33

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 32

Southern Pacific Co. v. Arizona,
325 U.S. 761 (1945) 24

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 30

Travelers Health Ass'n v. Virginia,
339 U.S. 643 (1950) 11, 27, 28

Watson v. Employers Liability Assurance Corp.,
348 U.S. 66 (1954) 28

STATUTES

7 P.S. § 6203 20

28 U.S.C. § 1254(1) 1

STATUTES (CONT'D)

69 Pa. Cons. Stat. Ann. § 1103 11

2010 Oregon Laws 1st Sp. Sess. Ch. 23 (S.B. 993) 19

Ariz. Rev. Stat. 6-1251 18

Cal. Fin. Code §§ 22322-22324 20

Conn. Gen. Stat Ann. § 36a-555 ..... 18, 19

D.C. Code § 28-3301(h) 17

Ind. Code § 24-4.5-1-201 ..... 2, 3, 6

Ind. Code § 24-4.5-1-201(1)(d) 3

Ind. Code § 24-4.5-3-508 3

Ind. Code § 24-4.5-7-101 et seq..... 4

Ind. Code § 24-4.5-7-201(4) 4

Ind. Code § 24-4.5-7-403 4

Ind. Code § 28-7-5-1 et seq..... 4

Ind. Code § 28-7-5-28 4

Kan. Stat. Ann. § 16a-1-201 ..... 17, 18

Me. Rev. Stat. Ann. Title 9-A § 1-201 18

STATUTES (CONT'D)

Minn. Stat. Ann. § 47.601 19

N.C. Gen. Stat. § 53-190 ..... 18, 20

N.M. Stat. Ann. § 58-15-24 18

N.Y. Banking Law § 340 18

Ohio Rev. Code Ann. § 1321.17 ..... 19, 20

Okla. Stat. Ann. Title 14A § 1-201(5) 12, 20

R.I. Gen. Laws § 19-14.2-1(c) 20

S.C. Code Ann. § 34-39-130(C) 20

Va. Code Ann. § 6.1-445 19

Va. Code Ann. § 6.1-469.1 19

Va. Code § 6.1-481 19

Vt. Stat. Ann. Title 8 § 2238 19

W. Va. Code § 46A-1-104 ..... 19, 20

Wyo. Stat. § 40-14-120(e) 20

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Notice to those Engaging or Considering Engaging in Nonmortgage Consumer Lending to Pennsylvania Residents, 38 Pa. Bull. 3986, July 26, 2008, *available at* http://www.pabulletin.com/secure/data/vol38/38-30/1371.html 12

Small Dollar Loan Products Scorecard: Statutory Backup, *available at* http://www.consumerfed.org/elements/www.consumerfed.org/File/statutory_backup_08(3).pdf 14

PETITION FOR WRIT OF CERTIORARI

David H. Mills respectfully petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this matter.

OPINIONS BELOW

The opinion of the United States District Court, Southern District of Indiana, is reported as *Midwest Title Loans, Inc. v. Ripley*, 616 F. Supp. 2d 897 (S.D. Ind. 2009), and is reprinted in the appendix at 21a. The Seventh Circuit's opinion is reported as *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010), and is reprinted in the appendix at 1a.

JURISDICTION

The Court of Appeals entered final judgment on January 28, 2010. The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, Sec. 8, Cl. 3

The Congress shall have Power *** To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes[.]

Indiana Code § 24-4.5-1-201
Territorial application; activities in other states by industrial loan and investment companies

Sec. 201. (1) Except as otherwise provided in this section, this article applies to sales, leases, and loans made in this state and to modifications, including refinancings, consolidations, and deferrals, made in this state, of sales, leases, and loans, wherever made. For purposes of this article, the following apply:

* * *

(d) Except as provided in subdivision (e), a sale, lease, or loan transaction occurs in Indiana if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor or a person acting on behalf of the creditor in another state and the creditor or the person acting on behalf of the creditor has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means. . . .

STATEMENT

Regulatory Background

In 2007, the Indiana General Assembly amended the Indiana Uniform Consumer Credit Code ("IUCCC") to impose licensing and regulatory requirements on lenders from Indiana and other States "who are soliciting by any means and then making consumer loans to Indiana residents[.]" App. at 54a; Ind. Code § 24-4.5-1-201. Under this "Territorial Application Provision," a loan transaction occurs in the State of Indiana "if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means," including mail, print and television. Ind. Code § 24-4.5-1-201(1)(d).

If a lender triggers the Territorial Application Provision by lending, advertising or soliciting in Indiana, the IUCCC applies to that lender's loans to Indiana residents. After obtaining the proper licenses from the Department of Financial Institutions, the lender, whether located in Indiana or elsewhere, may make loans to Indiana residents within Indiana's usury limits (capped at a maximum of 36% annually) and note its lien on the title of the consumer's motor vehicle as security for the loan. App. at 52a; Ind. Code § 24-4.5-3-508.

By way of comparison, Indiana also regulates other types of high-interest loans. "Payday" lenders are regulated by Indiana's Small Loan Act, where the lending limit is $550. *See* Ind. Code § 24-4.5-7-101 *et seq.*; § 24-4.5-7-201(4). With interest and fees, the annual rate may be as high as 391% for payday loans. *See Cash in a Flash, Inc. v. McCullough*, 853 N.E.2d 533, 536 (Ind. Ct. App. 2006). However, pursuant to Indiana Code Section 24-4.5-7-403, lenders may not accept security for payday loans other than a customer's check or automated clearinghouse electronic debit. In addition, a lender may obtain a pawnbroker's license pursuant to Indiana Code Section 28-7-5-1 *et seq.*, and charge interest and fees resulting in an APR as high as 276%. Ind. Code § 28-7-5-28. A pawnbroker, however, must retain physical possession of the borrower's property as security.

Midwest Title's Business Model

Midwest Title Loans, Inc. is a consumer installment loan company incorporated in Illinois and licensed by the Illinois Division of Financial Institutions. App. at 48a. Midwest Title is known as a "title lender" because it operates stores (including 23 in Illinois) from which it provides "title loans"—loans secured by title to the borrower's motor vehicle. *Id.* at 48a-49a. Although there are no Midwest Title stores in Indiana, Midwest Title has made thousands of title loans to Indiana residents who have taken their motor vehicles and titles to one

of Midwest Title's Illinois stores and applied in person for a loan. *Id.* at 50a. Approved applicants execute loan documents at Midwest Title's stores and provide Midwest Title with keys to the collateral vehicle in order to make self-help repossession easier in case of default. *Id.* at 50a-51a. Midwest Title submits the necessary documents to the Indiana Bureau of Motor Vehicles so that Midwest Title's lien will be noted on the title provided by the borrower. *Id.* at 52a. It provides the borrower with loan proceeds at its store in the form of a cashier's check drawn on an Illinois bank. *Id.* at 51a.

Midwest Title's title loans are payable in monthly installments over 12, 18, or 24 months, and the typical amount loaned is approximately 50% of the wholesale value of the vehicle securing the loan. *Id.* at 49a. Midwest Title charges an annual percentage interest rate of approximately 300%. *Id.* If permitted to apply, the Indiana Code would limit the per annum interest rate that Midwest Title could charge Indiana customers to 36%. *Id.*

Midwest Title requires Indiana borrowers to travel to Illinois to obtain a title loan, but with each such loan to an Indiana borrower, Midwest Title undertakes or anticipates several contacts with Indiana. For example, prior to this lawsuit, Midwest Title advertised on television stations in Indiana and bought listings in the Indiana Yellow Pages. *Id.* at 52a. Midwest Title sent annual mailings to past customers in Indiana in an attempt to solicit repeat

business. *Id.* at 51a. And, as noted, Midwest Title has submitted necessary documents to the Indiana Bureau of Motor Vehicles to record its liens on borrowers' car titles. *Id.* at 52a.

Continuing the transaction, Indiana borrowers may cash loan checks and deposit loan proceeds at Indiana banks and make their payments through the mail or in other ways that cross state lines. Upon default, Midwest Title pays an unaffiliated third party repossession company in Indiana to repossess the vehicle and then obtains a new title from the Indiana Bureau of Motor Vehicles showing Midwest Title as the owner of the vehicle. *Id.* at 53a. Repossessed vehicles remain in Indiana until sold through an unaffiliated Indiana auction house. *Id.*

Background of this Lawsuit

In August 2007, shortly after Indiana's Territorial Application Provision became law, the Supervisor of the Division of Consumer Credit—a division of the Department of Financial Institutions—sent a letter to Midwest Title advising that Indiana law "requires lenders who are soliciting by any means and then making consumer loans to Indiana residents to be licensed[.]" *Id.* at 54a. The letter further explained that under Indiana law, "[i]f a creditor has violated [this provision], the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in [Section] 24-4.5-5-201." *Id.*

Midwest Title stopped offering loans to Indiana residents and charging or collecting interest on loans to Indiana borrowers made between July 1, 2007, and Midwest Title's receipt of the letter ("Covered Loans"). *Id.* at 55a. It also refunded all previous interest payments on the Covered Loans but continued to collect principal. *Id.*

On November 16, 2007, Midwest Title filed its complaint challenging Indiana's ability to enforce the IUCCC against it. The district court issued an Order on March 24, 2009, granting Midwest Title's motion for summary judgment and declaring the Territorial Application Provision "unconstitutional as applied to Midwest Title to regulate title loans made wholly in the state of Illinois[.]" *Id.* at 43a. The district court issued a permanent injunction forbidding the Department of Financial Institutions to apply the IUCCC to "loans made wholly in the state of Illinois to Indiana residents." *Id.*

The Seventh Circuit affirmed, holding that regulating a contract physically signed in another State violates the Commerce Clause, regardless of interstate contacts. The opinion listed several pros and cons for regulating high interest loans and various state interests for doing so, but the court's rationale boiled down to one sentence: "The contract was, in short, made and executed in Illinois, and that is enough to show that the territorial-application provision violates the commerce clause." *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

States have a compelling interest in protecting their residents from predatory lending. Indeed they have always been permitted, even expected, to regulate lending through usury laws "despite the burden on commerce." *Aldens, Inc. v. Packel*, 524 F.2d 38, 48 (3d Cir. 1975). In the decision below, the Seventh Circuit acknowledged as much, App. at 8a, but ruled nonetheless that because Midwest Title's loan contracts are executed in Illinois, Indiana may not regulate Midwest Title's loans to Indiana residents.

This holding, which turns entirely on the location where the contract was executed rather than on the regulating State's overall interest in the transaction, conflicts with decisions of other circuits concerning state regulation of interstate consumer loan transactions and also causes unnecessary tension with due process doctrine. The decision is a problem not just for Indiana, but for many other States (and the District of Columbia) whose consumer protection laws could apply to contracts executed out of state. Particularly given the recent recession and the market it has created for high-interest loans, the Court should take this case to resolve whether States may regulate out-of-state loans to their citizens.

I. The Decision Below Conflicts With Decisions of Other Circuits Permitting States to Regulate Loans Issued in Other States to Their Citizens

In a series of Commerce Clause challenges brought by Illinois mail-order business Aldens, Inc., the Third and Tenth Circuits (as well as the Seventh Circuit) have permitted States to regulate credit terms of interstate purchases. *See Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978); *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 748 (7th Cir. 1977); *Aldens, Inc. v. Packel*, 524 F.2d 38, 41 (3d Cir. 1975). Under the Aldens business model, customers would apply through the mail to make purchases on credit, and Aldens would accept or reject the contract in Chicago. *Packel*, 524 F.2d at 41. If Aldens accepted the contract, it was fully executed, and Aldens would ship the merchandise to the customer in a transaction governed by the contract's terms. *Id.*

In *Packel*, the Third Circuit upheld Pennsylvania's law imposing interest rate caps (and requiring specific disclosures in contracts and billing statements) on such transactions with Pennsylvania residents. The court thought "it clear beyond question that Pennsylvania has a substantial interest in the rates paid by its residents to foreign companies for the use of money and in the contracts setting those rates." *Id.* at 43. The court explained that the Pennsylvania law did not impose improper trade protectionism because it "place[d]

Pennsylvanians and Illini exactly on a par in selling to Pennsylvanians. No local interest is given an advantage within or without Pennsylvania. If Aldens wants to sell to a Pennsylvanian it can only do so on the same terms as a Pennsylvania mail order seller[.]" *Id.* at 47. In other words, the State "is not attempting to export obligations to its treasury, or to export its public policy on consumer credit interest rates. It merely seeks to afford uniform protection to all Pennsylvania residents with respect to such rates." *Id.* at 49.

Furthermore, the Pennsylvania law did not impose an undue burden on interstate commerce: "The burden on interstate commerce does not depend upon the happenstance of respective locations of buyer and seller. The fundamental issue is whether the national interest in the free movement of money, credit, goods and services outweighs the valid local interest in restricting maximum interest rates on consumer 'loans'. . . ." *Id.* at 47-48. The court held that the local interest was stronger based on "the historical recognition that the states may, despite the burden on commerce, enact varying usury laws and varying contract laws[.]" *Id.* at 48. In contrast, the Seventh Circuit in this case held that "nondiscriminatory local regulations [can be] invalidated without a balancing of local benefit against out-of-state burden [when] states actually attempt to regulate activities in other states." App. at 10a.

Like the Third Circuit, the Tenth Circuit upheld an Oklahoma statute setting maximum interest rates for credit sales, observing that "the subject matter and purpose of the state regulation is the present day starting place for a consideration of the issues before us; thus the degree of interest of the state in the subject matter regulated, and how fundamental is this local interest." *Ryan*, 571 F.2d at 1161. The court applied a balancing test and rejected "[t]he 'per se' approach . . . to the Commerce Clause. . . . The states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits." *Id.* Further, the court noted that the Supreme Court had "'rejected the contention' that the doctrines of place of contracting and place of performance should govern, and held that they must give way to the 'degree of interest' the state had in the transaction of subject, and give way to the consequences of the contracts in the regulating states." *Id.* (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950)); *see also Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977) (upholding interstate application of a Wisconsin law setting a maximum permissible finance charge for extension of credit under open-end credit plans).

The Pennsylvania and Oklahoma usury laws upheld in the *Packel* and *Ryan* cases remain in force and would govern any loans from Midwest Title to residents of those states, regardless where made. *See* 69 Pa. Cons. Stat. Ann. § 1103 (West 2010);

Notice to those Engaging or Considering Engaging in Nonmortgage Consumer Lending to Pennsylvania Residents, 38 Pa. Bull. 3986, July 26, 2008, *available at* http://www.pabulletin.com/secure/data/vol38/38-30/1371.html (confirming that Pennsylvania law applies to lenders located in other States who lend money to Pennsylvania residents at rates greater than 6% per year); Okla. Stat. Ann. tit. 14 § 1-201(5) (West 2010) (requiring an Oklahoma license for any lender who issues a loan from another State to an Oklahoman, and precluding such lender from "collect[ing] charges through actions or other proceedings in excess of those permitted by" Oklahoma law or "enforce[ing] rights against the . . . debtor, with respect to the provisions of agreements which violate" Oklahoma law).

In fact, the Third Circuit just recently applied Pennsylvania law in adjudicating a dispute over a loan issued to a Pennsylvania citizen in Delaware, notwithstanding a Delaware choice-of-law clause in the loan contract. *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009). The court stated that because "Pennsylvania's interest in the dispute, particularly its antipathy to high interest rates such as the 300.01 percent interest charged in the contract at issue, represents such a fundamental policy[,] we must apply Pennsylvania law." *Id.*

So, while *Packel* and *Ryan* permit Pennsylvania and Oklahoma to regulate Midwest Title's loans to their citizens made in Illinois, the decision below

precludes Indiana from doing so. The Seventh Circuit plainly parted ways with both cases when it ruled that the site of contract execution, rather than a State's degree of interest in the transaction, determined whether the State could regulate. App. at 18a.

What is more, the *Aldens* cases undergird a more recent Tenth Circuit decision that conflicts with the decision below. In *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009), the court applied the "degree of interest" principles from *Ryan* to hold that a Kansas consumer lending regulation could apply to loans offered by an out-of-state company over the internet. In *Quik Payday*, the Tenth Circuit was very clear that "[e]ven if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas—notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas[,]" such that "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." *Quik Payday*, 549 F.3d at 1308. Thus, the Tenth Circuit found Quik Payday's contacts with the State of Kansas and the impact of the loan in Kansas—not simply the location where the contract was signed—to be of paramount importance.

By way of comparison, Hoosiers who borrow money from Midwest Title receive a check in Illinois, but even if they cash it there, these borrowers will

most likely spend the proceeds in Indiana, just as borrowers in *Quik Payday* were reasonably expected to spend their loan proceeds in Kansas. Yet the Seventh Circuit departed from the seemingly settled law exemplified by the *Aldens* and *Quik Payday* cases and looked only to where Midwest Title signs its contracts rather than to where the transactions begin (with advertisements in Indiana) and ultimately lead (back to Indiana). This conflict in result and reasoning justifies granting the Petition.

II. The Question Presented Warrants Review Because Many States Regulate Interstate Loans Amidst an Escalating Consumer Debt Crisis

All States regulate consumer loan interest rates, and at least *twenty* States plus the District of Columbia apply them to loans crossing state lines. *See* Small Dollar Loan Products Scorecard: Statutory Backup, *available at* http://www.consumerfed.org/elements/www.consumerfed.org/File/statutory_backup_08(3).pdf. The escalating consumer debt crisis underscores the significance of such State limits—and reinforces the need for review here.

1. Americans depend on credit now more than ever, and although "consumer over-indebtedness has been many years in the making, only recently has this crisis attracted widespread public attention." Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 Loy. U. Chi. L.J.

557, 557 (2009). The 2008 rescue of Bear Stearns and the collapse of Lehman Brothers, along with "the corresponding seizure of the financial markets in the United States, for the first time, have drawn widespread public attention to the operation of the financial system and its connection to and relationship with consumer debt." *Id.* at 558.

Debt levels have soared in the United States in part because increasingly innovative, higher-cost consumer debt products have expanded access to credit across economic classes. It is no secret that lower-income households are targeted by lenders because they are less likely to pay off their credit card debt or other high cost loans each month. *Id.* at 580. The resulting "debt treadmill" ensnares these consumers and makes more money for lenders.

Overall household consumer debt, even excluding mortgage debt, rose from $351 billion in 1980 to nearly $2,200 billion in 2006. *Id.* at 557 n.1. But since 2006, the situation has only become more urgent. The faltering economy has caused more people to resort to fringe banking as unemployment rates have increased and people have attempted to avoid foreclosure. In that environment, car title lending is one of the new innovations in high interest debt products. This industry "has grown tremendously in recent years in states that have failed to take adequate steps to protect borrowers." Amanda Quester and Jean Ann Fox, *Car Title*

Lending: Driving Borrowers to Financial Ruin, at 9, *available at* http://www.responsiblelending.org/other-consumer-loans/car-title-loans/rr008-Car_Title_Lending-0405.pdf. Sensing an opportunity to exploit a sour economy, the title lending industry has spent much time and money in recent years lobbying to charge high interest rates for such loans. *Id.* at 10.

High interest rate loans are particularly damaging because of possible long-term ramifications. Even apart from imposing difficult payments and high interest rates, these loans can have a negative impact on credit scores, particularly when borrowers initiate new loans seriatim to pay off prior loans, a practice that can cause borrowers to accumulate large amounts of debt. And because eligibility for low-interest mortgages, insurance, housing, and employment are often affected by credit history, temporary financial hardships that push the needy into the debt of predatory lenders can inflict financial scars lasting years into the future.

In this atmosphere of escalating debt and the resulting harm it causes, many States have ignored the pleas of industry lobbyists and, instead, passed laws to protect their citizen-borrowers. Indiana has concluded that permitting high interest rates for title loans is a bad idea, and if Indiana chooses to regulate lenders who solicit residents to take out 300% interest loans, it should be able to do so. If Indiana lacks that power, its citizens will go unprotected, for it is highly unlikely that other

States, no matter what regulations they impose on title lenders, will take action based on complaints by Indiana residents. Such a regulatory gap not only has implications for interest-rate caps, but also for more fundamental transgressions such as outright fraud. If Indiana cannot protect its citizens from unfair and deceptive trade practices, who will?

At the very least, States need to know just how far they can go when it comes to protecting their citizens from out-of-state predatory lending.

2. Indiana, Pennsylvania and Oklahoma are certainly not the only States to regulate loans to their residents where loan contracts are signed in other States. States have long controlled interest rates that lenders may offer their residents from across State borders. *See Packel*, 524 F.2d at 48.

In fact, at least twenty States and the District of Columbia have laws that can apply to loan contracts signed in other States. Some have statutes that, like Indiana's Territorial Application Provision, apply once a lender advertises in or directly solicits customers of the regulating State. *See, e.g.*, D.C. Code § 28-3301(h) (regulating consumer credit transactions involving a D.C. resident if the lender "has solicited or advertised in the District of Columbia by any means, including mail, brochure, telephone, print, radio, television, internet, or any other electronic means"); Kan. Stat. Ann. § 16a-1-

201[1] (controlling loans if "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means."); Me. Rev. Stat. Ann. tit. 9-A § 1-201 (applying if "[t]he creditor, wherever located, induces the consumer who is a resident of this State to enter into the transaction or open-end credit plan by face-to-face, mail, telephone or electronic mail solicitation in this State"); *see also* N.Y. Banking Law § 340 (triggered by solicitation within the State but including an exception for de minimis activity); N.C. Gen. Stat. § 53-190 (applying if any solicitation occurs inside North Carolina).

Other States' consumer loan regulations apply to loan contracts signed out-of-state based on the lender's number of transactions with the regulating State's residents, or the amount of the loan, or the rate of interest charged. *See, e.g.*, Ariz. Rev. Stat. Ann. § 6-1251 (applying to any lender who makes three or more payday or title loans to Arizona residents in a single calendar year); N.M. Stat. Ann. § 58-15-24 (applying to loans "made outside this state" for "the value of two thousand five hundred dollars ($2,500) or less . . . ."); Conn. Gen. Stat Ann. § 36a-555 (requiring licensing of any lender who loans

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[1] Upheld in *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009).

less than $15,000 at an interest rate higher than 12% per annum).

Still other States' laws apply if the consumer makes payments from, or spends loan proceeds in, that State, or if a consumer in the State consummates the loan through the mail or over the internet. *See, e.g.*, 2010 Oregon Laws 1st Sp. Sess. Ch. 23 (S.B. 993) (applying to payday or title loans made to Oregon residents "if the consumer makes a payment on the loan from Oregon . . ."); W. Va. Code § 46A-1-104 (applying if payment on the loan is to be made from West Virginia); Vt. Stat. Ann. tit. 8 § 2238 (applying if the commercial loan is made "for use" in Vermont); Minn. Stat. Ann. § 47.601, sub. 3 (applying Minnesota law to out-of-state lenders that "make[] a consumer small loan electronically via the Internet"); Ohio Rev. Code Ann. § 1321.17 (precluding enforcement of loan contracts that exceed Ohio's allowable rate of interest, including those made by lenders from other States who primarily make loans by mail).

Virginia regulates *payday* loans regardless of the location of the lender, *see* Va. Code Ann. §§ 6.1-445, 6.1-469.1, and just this year enacted a statute requiring that all *title* loans involving a resident of Virginia be made in accordance with Virginia law "whether or not the [lender] has a location in the Commonwealth. . . ." *See* Va. Code § 6.1-481, *available at* http://leg1.state.va.us/cgibin/legp504.exe

?101+ful+CHAP0477. Similarly, South Carolina requires lenders to obtain a license if lending to a customer that resides in South Carolina "whether or not that person has a location in South Carolina[.]" S.C. Code Ann. § 34-39-130(C).

Furthermore, echoing the holding in *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009) (discussed in Part I, *supra*), several States effectively regulate cross-border lending to their citizens by limiting liability for loans made at rates higher than allowed by the State's law. *See* Cal. Fin. Code §§ 22322-22324; N.C. Gen. Stat. § 53-190; Ohio Rev. Code Ann. § 1321.17; Okla. Stat. Ann. tit. 14A § 1-201(5); 7 P.S. § 6203; R.I. Gen. Laws § 19-14.2-1(c); W. Va. Code § 46A-1-104; Wyo. Stat. § 40-14-120(e).

Extraterritorial application of consumer loan regulations is thus an important issue throughout the Nation, both for regulating lenders and for enforcing loan contracts. The Court's intervention is warranted so that all lenders, borrowers and regulators will be governed by the same rules of extraterritoriality.

III. The Court Below Erroneously Relied on Price-Affirmation Cases and Thereby Created New Tension Between Commerce Clause and Due Process Doctrine

In the decision below, the Seventh Circuit relied on *Healy v. Beer Institute*, 491 U.S. 324 (1989), and

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), to conclude that the Commerce Clause compels invalidation of any state statute that regulates commercial activity beyond the state's borders, regardless of the impact that activity has in the regulating State. These cases, however, stand only for the highly limited proposition that state laws are invalid where they (1) regulate wholly extraterritorial commercial activity and (2) protect the state's consumers at the expense of consumers in other States. This Court has announced other doctrines for evaluating legitimate State consumer-protection laws that apply to out-of-state commercial undertakings.

A. *Brown-Forman* and *Healy* Do Not Stand for the Rule Applied Below

Brown-Forman and Healy both addressed alcohol price-affirmation statutes that prevented consumers in other States from getting better prices than consumers in the regulating State. In *Brown-Forman*, 476 U.S. at 575, the Court invalidated a New York price-affirmation statute that required liquor distillers and producers to sell their wares to New York wholesalers at prices no higher than the prices they charge wholesalers anywhere else in the country. And because the statute required distillers and producers to affirm their prices in other States 10 days prior to the effective date, it both regulated commerce occurring wholly outside New York State *and* did so at the expense of businesses and

consumers in other States. That is, once producers filed their price affirmations, they could lower their prices to New York wholesalers, but not wholesalers in other States. *Id.* at 577.

A few years later, in *Healy*, 491 U.S. at 329, the Court extended its producer-level holding from *Brown-Forman* to the wholesale level. In *Healy*, the Court invalidated a price-affirmation law precluding wholesalers from selling to retailers outside Connecticut for less than to retailers in Connecticut. In so doing, the Court stated that the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 336.

These price-affirmation laws had the effect of dictating prices that an out-of-state producer could charge to an out-of-state buyer—exactly the sort of extraterritorial application of laws that the Commerce Clause prohibits. While Connecticut had a legitimate interest in keeping absolute prices low for its residents, that interest was not implicated by the comparative prices charged to consumers in other States. *Id.* States do not, that is, have a legitimate interest in ensuring that their residents pay the lowest prices offered anywhere. Such an "attempt[] to give local consumers an advantage over consumers in other States" amounts to illegitimate economic protectionism. *Brown-Forman*, 476 U.S. at 580.

Accordingly, the Court's prohibition against "regulating commerce occurring wholly outside that State's borders" does not mean that States may not under any circumstances regulate transactions where the contract is signed outside the State. Rather, it means only that a State may not regulate extraterritorially where to do so benefits its own citizens only by burdening the citizens of other States.

Indiana's regulation of title loans, while seeking to limit the price of capital for Hoosiers, does not do so at the expense of residents of other States. Indiana imposes a determinate APR cap for title loans to Indiana residents, but it does not require Midwest Title to offer rates no higher than rates it offers to Illinois residents. Accordingly, there is no illegitimate economic protectionism. Rather, Indiana's stake is the traditional compelling interest in protecting consumers from predatory lending practices that ultimately have negative effects in Indiana.

Another critical distinction with *Brown-Forman* and *Healy* is the lack of any prospect that similar statutes in other States would lead to an interlocking web of regulations subjecting individual loans to multiple, and perhaps inconsistent, regulatory oversight. In *Healy*, the Court was troubled that "the practical effect of this affirmation law, in conjunction with the many other beer-pricing

and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. The Indiana statute creates no interlocking regulations: it has no effect on the interest rates Midwest Title charges borrowers outside of Indiana, and no loan that Midwest Title makes to an Indiana consumer subject to the Indiana APR caps will be stymied by conflicting laws of other States.

Indiana's title lending statute is not the kind of law that the Court rejected in *Brown-Forman* and *Healy*, and the Seventh Circuit erred in relying on those cases.

B. A more deferential standard applies to laws that affect commerce in other States while protecting against injuries at home

Because Indiana's title lending law vindicates compelling state consumer-protection interests, the Seventh Circuit should have applied a far more deferential standard. At most it should have subjected the Indiana law to some sort of balancing test such as the Court has historically used to evaluate laws having interstate effects while providing legitimate local protection. *See Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Edgar v.*

MITE Corp., 457 U.S. 624, 644 (1982); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987); *but see Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) (holding that rational-basis review is appropriate when statutes "do not give local firms any competitive advantage over those located elsewhere.").

Indiana's law would easily survive a balancing test. Indiana and other States historically have had a compelling interest in protecting their residents from predatory lending in all forms, including payday loans, pawn loans, title lending and revolving debt. Indeed, if Midwest Title's loans were secured by real property located in Indiana, there surely would be no question that Indiana could regulate them. An automobile owned by an Indiana resident, while not real property, has similarly strong ties to the State because it is registered in Indiana, is driven mostly on Indiana's roads, and embodies a significant amount of the Indiana resident's material wealth.

In contrast, the burden that the IUCCC imposes on interstate commerce—capping Midwest Title's APR—is light. It does not keep Midwest Title from lending to Indiana residents, and does not even cap Midwest Title's interest rates for Indiana residents if Midwest Title is willing to forgo advertising and soliciting in Indiana. Midwest Title has never even

attempted to argue that Indiana's statute would fail a balancing test.[2]

C. Because due process plainly permits one State's law to apply to a financial contract signed in another State, the decision below creates tension in the law of extraterritorial application

The Commerce Clause is not the only constitutional limit on extraterritorial application of state law. The Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause also limit how far States may go in regulating activities that occur in other States. Scholars agree that the Court's decisions concerning constitutional limits on the extraterritorial application of State law have been "murky and contradictory," yielding "no clear answer" as to proper circumstances for applying Commerce Clause or due process doctrine. Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle In Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1061 (2009). Indeed, "constitutional doctrine to this day does not clearly tell us to what extent states may regulate people and things outside

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[2] Balancing would also address the Seventh Circuit's concern about whether Indiana could regulate gambling by its citizens at Las Vegas casinos. App. at 12a. Gambling at an out-of-state casino does not imply the same sort of long-term ongoing transaction involving the borrower's home state as a 24-month title loan bearing 300% interest.

their borders." Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 1154 (2010); *see also* Katherine Florey, *State Extraterritorial Powers Reconsidered: A Reply*, 85 Notre Dame L. Rev. 1157, 1157 (2010) (hereinafter, Florey, *Reply*) (describing multiple existing approaches to problems of extraterritorial application as "a haphazard assemblage of sometimes-inconsistent principles that courts have failed to justify or reconcile to any meaningful degree").

By treating *Healy* and *Brown-Forman* as it did, however, the Seventh Circuit in this case unnecessarily created *new* tension between due process doctrine and Commerce Clause doctrine in non-tax economic regulation cases.[3]

1. Due process analysis permits extraterritorial regulation based on a range of state connections

In due process cases, this Court has examined *all* relevant contacts with the regulating State, not simply the site of contract execution, to discern which State's laws can apply. A State's power to regulate is not "determined by a conceptualistic

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[3] Because Full Faith and Credit doctrine generally tracks due process doctrine or otherwise applies in a discrete set of cases not relevant here, *see Allstate Insurance Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981), our discussion focuses only on tensions between the Commerce and Due Process Clauses.

discussion of theories of the place of contracting or of performance. Instead [the Court has] accorded great weight to the consequences of the contractual obligations in the state where the insured resided and the degree of interest that state had in seeing that those obligations were faithfully carried out." *Travelers Health Association v. Virginia*, 339 U.S. 643, 647-48 (1950) (internal citations omitted).

Accordingly, the Court has permitted, in response to due process objections, extraterritorial application of consumer protection statutes where multiple contacts of various types exist between the regulating State and the regulated business. In *Watson v. Employers Liability Assurance Corporation*, 348 U.S. 66, 72 (1954), the Court held that a Louisiana statute could constitutionally apply to a Massachusetts insurance contract because it "is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers." In fact, "[p]ersons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. . . . The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help." *Id.* Furthermore, "Louisiana courts in most instances provide the most convenient forum for trial of these cases." *Id.* Finally, because of "Louisiana's legitimate interest in safeguarding the rights of persons injured there[,] . . . the direct action provisions . . . do not violate due process." *Id.* at 73.

Similarly, in *Allstate Insurance Company v. Hague,* 449 U.S. 302 (1981), the Court upheld application of a Minnesota insurance stacking provision to policies issued in Wisconsin. Collecting prior authority (including *Watson*), the Court ruled that, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13. Again, what mattered was the aggregation of significant contacts, not the site of contract formation.

Even when the Court has rejected extraterritorial application of a consumer protection statute on due process grounds, it has done so based on lack of minimum contacts rather than the site of contract formation. In *Home Insurance Company v. Dick*, 281 U.S. 397, 408 (1930), the Supreme Court found that Texas did not have legislative jurisdiction to regulate an insurance policy that had been issued (1) in Mexico, (2) by a Mexican insurer, (3) to a Mexican citizen, and (4) covering a Mexican risk, when "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas." Again, the implication is not that site of contracting was determinative, but that some aggregation of minimum contacts, including reasonably foreseeable injury in the rule-of-decision state, be present.

Based on these precedents, lower federal courts resolve matters of legislative jurisdiction based on minimum significant contacts, not site of contracting. In *Gerling Global Reinsurance Corporation of America v. Gallagher*, 267 F.3d 1228, 1237-38 (11th Cir. 2001), for example, the court, relying on *Hague*, held that legislative jurisdiction exists where there is "at least some minimal contact between a state and the regulated subject matter or transaction . . . ." *See also Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir. 1999) (concluding that "although not identical, judicial and legislative jurisdiction are determined pursuant to like guidelines").

Brown-Forman and *Healy* did not repudiate those cases. Indeed, the Court in *Healy* relied expressly on Justice White's plurality opinion in *Edgar v. MITE Corporation*, which stated that "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Edgar*, 457 U.S. at 643. Furthermore, the Court has made some efforts to reconcile Commerce Clause and due process doctrine as they relate to extraterritorial application of State law. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003). As the decision below demonstrates, however, further guidance is plainly needed. *See* Florey, *supra*, at 1112 ("while the Supreme Court has suggested in cases like *Gore* and

Campbell that the two lines of cases may overlap, it has never fully reconciled them. As a result, the current doctrine lacks coherence, clear boundaries, and ease of application").

2. The Seventh Circuit acknowledged that it was diverging from standard choice-of-law principles

The Seventh Circuit expressly acknowledged that its ruling conflicts with traditional choice-of-law doctrine predicated on due process principles, but it dismissed the significance of that conflict. *Id.* at 16a-17a. In particular, it recognized that, if a borrower were to sue Midwest Title for violating the IUCCC, "an Indiana court might rule that Indiana had the 'most intimate contacts' with the transaction and therefore that its law applied even though the loan had been made in Illinois." *Id.* at 16a. One might think that a state interest enabling *choice-of-law jurisdiction* would also, by definition, enable *extraterritorial regulation*. Not so, according to the decision below: "the presence of an interest that might support state jurisdiction without violating the due process clause of the Fourteenth Amendment [does not] dissolve[] the constitutional objection to extraterritorial regulation[.]" *Id.*

To restate: according to the Seventh Circuit, the IUCCC, with its title loan contract rate caps and rescission rights, could constitutionally supply the rule of decision in a lawsuit between Midwest Title

and an Indiana borrower over a contract signed in Illinois loaning money at 300% interest. Yet, Indiana may not constitutionally enforce prophylactic regulations against Midwest Title to prevent that injurious loan from ever being made. So, while the Department of Financial Institutions *cannot* prevent Midwest Title from making 300% loans, it *can* encourage Hoosier borrowers to sue under the IUCCC to cancel 300% loan contracts after spending the proceeds. Such an outcome would appear to be a win/win for Hoosier borrowers, but it would also yield an inefficient regulatory model, to say the least.

More to the point, the Seventh Circuit provided no explanation for how it can be constitutionally correct to treat prophylactic regulations differently from post-hoc liability laws. Different standards cannot be justified simply because "[t]he concerns behind the due process and commerce clauses are different." *Id.* at 17a. Presumably, *both* clauses apply to the extraterritorial application of *both* kinds of laws. This Court itself has long rejected any meaningful distinction between statutes and common law, or between prophylactic and post-hoc applications, when it comes to constitutional challenges to State law. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Gore*, 517 U.S. at 572 n.17; *see also* Florey, *Reply*, *supra*, at 1158 (observing that "a distinction between regulation by state legislatures and application of

state law by state courts . . . simply cannot be maintained or justified").

Nor does the Seventh Circuit's citation to *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), resolve the tension. *Quill* confirmed the rule from *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), that a State can require an out-of-state business to collect and remit sales and use taxes only if the business has a "physical presence" in the taxing State—a standard more limiting than what the Due Process Clause would permit. *Quill*, 504 U.S. at 314. *Quill* held as it did, however, largely as a matter of *stare decisis* rather agreement with *Bellas Hess*. *Id.* at 311 (observing that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today").

And though it refused to overturn the *Bellas Hess* physical-presence rule in *Quill*, the Court repeatedly stated that the rule applies only to sales or use tax collection requirements. "The same physical-presence requirement that *Bellas Hess* established for sales and use taxes" does not even apply "to other types of taxes." *Quill*, 504 U.S. at 314; *see also id.* at 317 (noting that *Bellas Hess* rule does not apply in cases "concerning other types of taxes"). So, while due process and Commerce Clause analyses need not be identical, the Court has minimized any tension between them by making it clear that a regulating State's legitimate interests are relevant to both,

except where sales and use taxes are at issue, in which case only physical presence counts under the Commerce Clause.

On its own, however, the Seventh Circuit has now effectively extended this limited Commerce Clause formalism to the larger regulatory context. Doing so creates palpable tension with due process doctrine across many regulatory sectors—tension that this Court apparently thought it had limited to the sales and use tax context in *Quill*.

One obvious consequence may be that large swaths of choice-of-law rules, arrived at incrementally over decades of highly factual litigation over forum-state regulatory interests, will now be open to question. In other words, despite its insouciant effort to confine Commerce Clause analysis to the actions of state regulators, the Seventh Circuit has effectively issued an invitation for litigants to argue choice-of-law issues based not only on which State has the greater regulatory interest (an argument that usually sounds in due process but that also fits the Commerce Clause balancing test), but also based on the formalistic question of where the contract was signed (an argument arising exclusively under the Commerce Clause).

In order to avoid unnecessary tension between due process and Commerce Clause doctrine—which the Seventh Circuit's ruling all but ensures—

extraterritorial application of a state consumer protection law should for all purposes turn not only on where the contract at issue was executed, but also on the State's overall interest in the transaction. The Seventh Circuit recognized Indiana's compelling interest in regulating Midwest Title's loans to its residents, but rejected the constitutional significance of that interest because of where the parties signed the formal contract. The Court should take this case to decide whether that was the proper analysis.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: April 28, 2010

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-2083

MIDWEST TITLE LOANS, INC.,
Plaintiff-Appellee,

v.

DAVID H. MILLS, Director of the Indiana Department of Financial Institutions,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:07-cv-1479-SEB-DML—Sarah Evans Barker, *Judge.*

Argued November 10, 2009—
Decided January 28, 2010

Before POSNER and FLAUM, *Circuit Judges*, and DER-YEGHIAYAN, *District Judge.*[*]

POSNER, *Circuit Judge.* An Illinois loan company, Midwest Title Loans, Inc., sued under 42 U.S.C. § 1983 to enjoin, as a violation of the commerce clause, the application to Midwest of Indiana's version of the Uniform Consumer Credit

[*] Hon. Samuel Der-Yeghiayan of the Northern District of Illinois, sitting by designation.

Code (a model code, provisions of which have been adopted in several states). Ind. Code §§ 24-4.5-1-101 *et seq.* The district court entered a permanent injunction, and the state appeals.

A provision added to the Indiana version of the model code in 2007 and aptly termed the "territorial application" provision states that a loan is deemed to occur in Indiana if a resident of the state "enters into a consumer sale, lease or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means." § 24-4.5-1-201(1)(d). If the territorial-application provision is triggered, the lender becomes subject to the code and must therefore get a license from the state to make consumer loans and is bound by a variety of restrictions that include a ceiling on the annual interest rate that a lender may charge. The ceiling is the lower of 21 percent of the entire unpaid balance, or 36 percent on the first $300 of unpaid principal, 21 percent on the next $700, and 15 percent on the remainder. § 24-4.5-3-508. (There is an exception, inapplicable to this case, for payday loans. § 24-4.5-7-101 *et seq.*) A lender required to have a license who fails to obtain it or violates any of the statutory restrictions exposes himself to a variety of administrative and civil remedies. §§ 24-4.5-6-108, 24- 4.5-6-110, 24-4.5-6-113. The failure to obtain a license also voids the loan—the borrower doesn't have to repay even the principal. And a borrower who has paid finance charges in excess of those

permitted by the code is entitled to a refund. § 24-4.5-5-202.

Midwest Title is what is known as a "[car] title lender." "Cash loans, variously called car title pawn, car title loans, title pledge loans, or motor vehicle equity lines of credit, are the latest, fast-growing form of high cost, high risk loans targeting cash strapped American consumers. Storefront and online lenders advance a few hundred to a few thousand dollars based on the titles to paid-for vehicles. Loans are usually for a fraction of the vehicle's value and must be repaid in a single payment at the end of the month. Loans are made without consideration of ability to repay, resulting in many loans being renewed month after month to avoid repossession. Like payday loans, title loans charge triple digit interest rates, threaten a valuable asset, and trap borrowers in a cycle of debt." Jean Ann Fox & Elizabeth Guy, "Driven into Debt: CFA Car Title Loan Store and Online Survey," p. 1 (Nov. 2005), www.consumerfed.org/pdfs/Car_Title_Loan_Report_111705.pdf (visited Dec. 4, 2009); see also Michael S. Barr, "Banking the Poor," 21 *Yale J. Reg.* 121, 164-66 (2004).

Until it received a letter in August 2007 from Indiana's Department of Financial Institutions advising it of the addition of the territorial-application provision to the code, Midwest had made title loans to Hoosiers (as Indianans like to call themselves) at annual percentage interest rates almost ten times higher than the maximum permitted by the code. They had a maturity of 12 to 24 months, were secured by the title to the

borrower's motor vehicle, and were for no more than half the vehicle's estimated wholesale value. The loans were made only in person, at Midwest's offices in Illinois—it had no offices in Indiana. The loan would be in the form of a cashier's check payable to the borrower, drawn on an Illinois bank. The borrower was required to hand over a set of his car keys at the closing to enable Midwest to exercise self-help repossession of the car in the event of a default, so that it wouldn't have to go to court to enforce its lien should the borrower default. (In this respect, title lending is like pawnbroking—hence the alternative name "car title pawns.") A suit to enforce the lien would be infeasible because of the small size of the loans relative to the costs of litigation.

Midwest would notify the Indiana Bureau of Motor Vehicles of the loan as soon as it was made, so that it would be noted on the official record of the borrower's title, thus protecting Midwest's rights as a creditor from subsequent creditors to whom the debtor might grant a security interest in the vehicle. Repossessions occurred, naturally, in Indiana. Midwest would arrange with an Indiana firm to auction off the repossessed vehicle, and the auction would be held in Indiana.

Midwest advertised the loans on Indiana television stations and through direct mailings to Indiana residents. In 2006 it made more than two thousand such loans to Hoosiers, amounting to 9 percent of its loans that year. The two states adjoin and many Hoosiers live within a short drive, or even a walk, of Illinois. Ten of Midwest's 23 offices in Illinois are within approximately 30 miles of the

Indiana border. Midwest discontinued its lending to residents of Indiana when it received the notice that the Indiana code applied to that lending.

The state asserts an interest in protecting its residents from what it describes as "predatory lending." There is a considerable body of thought that many consumers are incapable of making sensible decisions about credit. E.g., Oren Bar-Gill & Elizabeth Warren, "Making Credit Safer," 157 *U. Pa. L. Rev.* 1, 44-45 (2008); Paige Marta Skiba & Jeremy Tobacman, "Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default" (2008), http://bpp.wharton.upenn.edu/tobacman/papers/payday.pdf (visited Dec. 4, 2009); Ronald J. Mann & Jim Hawkins, "Just Until Payday," 54 *UCLA L. Rev.* 855, 881-82 (2007); Amanda Quester & Jean Ann Fox, "Car Title Lending: Driving Borrowers to Financial Ruin," pp. 6-7, Apr. 2005, www.consumerfed.org/pdfs/driving_borrowers_rpt.pdf (visited Jan. 13, 2010); Lynn Drysdale & Kathleen E. Keest, "The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenges to Current Thinking About the Role of Usury Laws in Today's Society," 51 *S. Car. L. Rev.* 589, 605-10 (2000). According to this literature, many consumers can't make sense of the interest rates and other fees charged by loan companies, in part because of the complexity of most loan documents. They end up paying absurdly high rates when they could borrow at much lower rates from a bank or, without having to borrow at all, could draw upon savings that earn low interest. Many of the borrowers, lacking self-control—but unaware of this and therefore unable to

take countermeasures—are incapable of moderating their desire for goods and services and end up overindebted.

The literature is mainly about payday loans but appears applicable to title loans as well. (See the articles by Fox & Guy and by Barr.) These and related forms of lending have been called "fringe banking," Ronald Paul Hill, "Stalking the Poverty Consumer: A Retrospective Examination of Modern Ethical Dilemmas," 37 *Journal of Business Ethics* 209, 214-15 (2002), but the pathologies identified in the literature may extend to more conventional forms of credit transactions. Bar-Gill & Warren, *supra*, 157 *U. Pa. L. Rev.* at 26-43; Oren Bar-Gill, "Seduction by Plastic," 98 *Nw. U. L. Rev.* 1373, 1375-76, 1395-1401 (2004). Congress is considering enacting a statute, proposed by the Treasury Department, that would create a federal Consumer Financial Protection Agency empowered to adopt regulations designed not only to prevent outright fraud in credit transactions but also to protect consumers of financial products from their cognitive limitations, limitations emphasized by behavioral economists. Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (July 8, 2009); Adam J. Levitin, "The Consumer Financial Protection Agency," *Am. Bankr. Inst. J.*, Oct. 2009, pp. 10, 66-67; Joshua D. Wright & Todd J. Zywicki, "Three Problematic Truths About the Consumer Financial Protection Agency Act of 2009," *Lombard Street*, Sept. 14, 2009, pp. 29, 30-31; Editorial, "The State of Financial Reform," *New York Times*, Oct. 25, 2009, p. 7.

A contrary school of thought points out that people who cannot borrow from a bank because they have poor credit may need a loan desperately. If a ceiling is placed on interest rates, these unfortunates may be unable to borrow because the ceiling may be too low for the interest rate to compensate the lender for the risk of default. As a result, they may lose their house or car or other property or find themselves at the mercy of loan sharks. See Todd J. Zywicki, "Consumer Welfare and the Regulation of Title Pledge Lending," Mercatus Center Working Paper No. 09-36 (Sept. 2009), www.mercatus.org/sites/default/files/publication/WP0936_Consumer_Welfare_and_Regulation_of_Title_Pledge_Lending.pdf (visited Dec. 4, 2009); Jonathan Zinman, "Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap," 34 *J. Banking & Finance* (forthcoming 2010); Donald P. Morgan & Michael R. Strain, "Payday Holiday: How Households Fare after Payday Credit Bans" (Federal Reserve Bank of New York Staff Reports No. 309, Feb. 2008), http://ftp.ny.frb.org/research/staff_reports/sr309.pdf (visited Dec. 4, 2009); Mann & Hawkins, *supra*, 54 *UCLA L. Rev.* at 884-94 (2007); Gregory Elliehausen, "Consumers' Use of High-Price Credit Products: Do They Know What They Are Doing?" (Networks Financial Institute Working Paper No. 2006- WP-02, May 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921909) (visited Dec. 4, 2009). An annual interest rate of 300 percent is astronomical. But a person who borrows $5,000 at that rate and repays it two weeks later pays only $577 in interest, and the loan may have enabled him

to avert foreclosure on his house, or some other dire event that would have cost him more than $577.

Against this benign view of "fringe banking" it has been argued that many of the borrowers end up rolling over their loans from month to month, which runs counter to the theory that these are short-term loans rationally incurred, despite their high cost, as a temporary response to unexpected setbacks. See Michael A. Stegman & Robert Faris, "Payday Lending: A Business Model That Encourages Chronic Borrowing," 17 *Economic Development Quarterly* 8, 19-21 (2003); Quester & Fox, *supra*, at 6-7; Drysdale & Keest, *supra*, 51 *S. Car. L. Rev.* at 605-10; and the passage quoted earlier from Fox & Guy.

We need not take sides in the controversy over the merits of "fringe banking." It is enough that Indiana has a colorable interest in protecting its residents from the type of loan that Midwest purveys.

Article I, § 8, cl. 8 of the Constitution, which provides so far as bears on this case that "Congress shall have Power . . . to regulate Commerce . . . among the several States," has been interpreted to bar states from establishing tariff walls or other harmful barriers to trade across state lines. E.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-94 (1994); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 280-87 (1987); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-23 (1935) (Cardozo, J.). This interpretation is controversial, in part because it seems to do violence to the language

of the clause. But it does not. The clause is ambiguous. If emphasis is placed on the first word—"Congress shall have Power"—the clause implies that the states shall not have the power to regulate commerce. Because of the politics and workload of Congress, unless the courts recognized and enforced the exclusive federal power to regulate commerce the nation would be riddled with state tariffs; and a nation with internal tariff barriers is hardly a nation at all.

Tariffs seek to protect local producers from competition. Indiana, however, isn't trying to protect its title lenders from the competition of title lenders in other states. The territorial-application provision does not make Indiana law treat a title lender located in another state, such as Midwest, any worse than it treats Indiana lenders. All are subject to the same interest-rate ceilings and other strictures of the consumer credit code. But as the case law has long recognized, the commerce clause can be violated even when there is no outright discrimination in favor of local business. An earlier case of ours gave the example of "a severance tax on a raw material, such as oil or coal, of which the state (perhaps in conjunction with other states) has a monopoly or near monopoly and which is almost entirely exported rather than consumed locally. The incidence of the tax will fall on the consumers in other states, who have no voice in the politics of the producing state, and the result may be a level of taxation and resulting price to consumers that greatly exceeds the cost of the services that the state provides to producers of the raw material and that by doing so burdens the export of the raw material to other

states." *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 555 (7th Cir. 2007). In such a case, where the regulation is local but the consequences felt elsewhere, we explained that a plaintiff "has a steep hill to climb. 'Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-74 (1981)." See also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130-32 (7th Cir. 1995).

But another class of nondiscriminatory local regulations is invalidated without a balancing of local benefit against out-of-state burden, and that is where states actually attempt to regulate activities in other states. "The Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy v. Beer Institute*, 491 U.S. 324, 337 (1989); see also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, *supra*, 476 U.S. at 582-84; *Baldwin v. G.A.F. Seelig, Inc.*, *supra*, 294 U.S. at 521; *Dean Foods Co. v. Brancel*, 187 F.3d 609, 614-20 (7th Cir. 1999); *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 378-80 (7th Cir. 1998); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 62-64 (1st Cir. 2008); *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North*

America, Inc., 492 F.3d 484, 488-90 (4th Cir. 2007); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-41 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96, 102-04 (2d Cir. 2003); *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638-40 (9th Cir. 1993); cf. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 570-73 (1996).

In *Healy*, Connecticut had passed a "price affirmation" law that required brewers to commit that the prices they charged for beer in Connecticut were no higher at the time of posting than the lowest prices charged in any state that bordered Connecticut. There was no discrimination in favor of Connecticut brewers, because there were no Connecticut brewers. Nevertheless the Supreme Court invalidated the law. A brewer might sell beer in New York and Connecticut and charge a higher price in Connecticut because the people of that state liked its beer more than New Yorkers did. Faced with the Connecticut price-affirmation law and viewing Connecticut as its more valuable market, the brewer might decide to raise its price in New York to the level of its price in Connecticut rather than reducing its Connecticut price. The state would thus be regulating prices in another state, albeit indirectly. Commerce would be impeded if states could regulate commercial activities in other states. The Court held that Connecticut's law violated the commerce clause

The present case is both stronger and weaker for Midwest than *Healy* was for the Beer Institute. It is stronger because the effect of the territorial-application provision on an out-of-state business

selling to customers in that state is more direct than in *Healy*; the provision forbids the making of title loans in Illinois to residents of Indiana on the terms agreed to by the parties. It is weaker because there is no interference with transactions with residents of another state—but that cannot be a complete defense. Suppose Indiana decided that gambling had become a serious problem for its residents—many of them were becoming addicted and this was leading to bankruptcies that were playing havoc with family life and the Indiana economy. And so it decided to ban casinos in the state and to require casinos in all other states, if they wanted to do business with residents of Indiana, to obtain a license from Indiana that would forbid their allowing a Hoosier to bet more than $10 a day in a casino. A state law of that kind, however well intentioned and genuinely beneficial to the state imposing it, would burden interstate commerce by restricting travel and a firm's ability to deal with residents of a different state, even though the law treated out-of-state businesses no worse (in our example, even slightly better) than businesses located in the state. In *Quill Corp. v. North Dakota*, 504 U.S. 298, 314-18 (1992), the Supreme Court held that a state whose residents purchased by mail from sellers who had no office in the state could not require the seller to collect the use tax that the state imposed on sales to its residents. That is an example of extraterritorial regulation held to violate the commerce clause even though the entity sought to be regulated received substantial benefits from the regulating state, just as Indiana's regulation of Illinois lenders furthers a

local interest—the protection of gullible or necessitous borrowers.

This case may seem less extreme than our hypothetical case of the gambling law. But that is only because the parties have chosen to focus on the single out-of-state firm that happens to be the plaintiff, and the firm operates in a neighboring state, unlike a casino in Nevada. Illinois is not the only state that borders on Indiana, however. Title lenders in all four states contiguous to Illinois may decide not to seek an Indiana license but instead just to stop doing business with residents of Indiana, as Midwest has done even though they account for a significant part of the business of its Illinois offices.

Should we worry that Midwest may have distorted the ordinary mode of doing business in its industry in order to be able to invoke the constitutional prohibition of extraterritorial state regulation? Might not Midwest, were it not maneuvering to come under the umbrella of *Healy*, have opened offices in Indiana to serve its numerous Indiana customers? Had it done so, it would have come within the reach of the Indiana law without reference to the territorial-application provision.

But against this surmise is the fact that Midwest's practice of serving its Indiana customers exclusively from offices located in Illinois predated Indiana's attempt to apply its consumer credit code extraterritorially. Midwest prefers to deal with its customers face to face so that it can size them up, inspect the car, and check that the car keys that the customer gives it really are the keys for that car.

Since so many Hoosiers live within a stone's throw of Chicago, Midwest felt no need to establish separate offices across the state line. There may also be aspects of Indiana law unrelated to its consumer credit code that deterred Midwest from opening any offices in the state.

There is no suggestion that Midwest located its offices in Illinois where it did in order to poach Hoosiers. It's not as if the offices are in parts of eastern Illinois in which the only consumer concentrations are in Indiana. Eight of Midwest's ten Illinois stores that are closest to the Indiana state line are in the Chicago metropolitan area. And it's not as if Midwest had been an Indiana firm operating only in Indiana, had relocated to Illinois, just across the border, when the territorial-application provision was enacted, and had continued to lend to residents of Indiana.

"Generally speaking," the Supreme Court said in *Healy*, "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." 491 U.S. at 336-37; see also *Morley-Murphy Co. v. Zenith Electronics Corp.*, *supra*, 142 F.3d at 378-80; *National Collegiate Athletic Ass'n v. Miller*, *supra*, 10 F.3d at 638-40. True, a couple of cases in other circuits suggest that the only relevant inconsistency is placing a firm under "inconsistent obligations." *Pharmaceutical Research & Manufacturers of America v. Concannon*, 249 F.3d 66, 82-83 (1st Cir. 2001); see also *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994). And that is not the situation

here; Midwest can comply with Indiana's consumer credit code without (so far as appears) violating the law of Illinois or any other state. But we took a broader view of inconsistent state policies in the *Morley-Murphy* case and we must do so in this one. Suppose Illinois thinks title loans a good thing (and there is, as we pointed out earlier, some basis for that belief)—or at least, as the absence of an Illinois counterpart to the Indiana law makes clear, thinks they shouldn't be restricted in the way that Indiana thinks they should be. To allow Indiana to apply its law against title loans when its residents transact in a different state that has a different law would be arbitrarily to exalt the public policy of one state over that of another.

Indiana points out that despite this arguable symmetry of state interests, its interest in regulating credit may be great enough to allow its courts to apply its credit law should Midwest sue a defaulting Indiana borrower in an Indiana court. Not that such suits are likely. The loans are too small to justify the expense of suits to collect them if there is a default; hence the importance to Midwest of self-help repossession. Midwest has yet to sue any of its title borrowers. But if there were a suit, an Indiana court might rule that Indiana had the "most intimate contacts" with the transaction and therefore that its law applied even though the loan had been made in Illinois. See, e.g., *OVRS Acquisition Corp. v. Community Health Services, Inc.*, 657 N.E.2d 117, 124 (Ind. App. 1995); *Dohm & Nelke v. Wilson Foods Corp.*, 531 N.E.2d 512, 513 (Ind. App. 1988); *Eby v. York-Division*, 455 N.E.2d 623, 626 (Ind. App. 1983). Or it might rule that Illinois's failure to limit the

interest rates in title loans was so offensive to the public policy of Indiana that the Illinois law would not be enforced in Indiana—in which event the Indiana courts might refuse to apply Illinois law even if Midwest's contracts contained a choice of law clause directing that Illinois law govern a suit arising from the contract—which they do. *Moll v. South Central Solar Systems, Inc.*, 419 N.E.2d 154, 162 (Ind. App. 1981); *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 132-33 (7th Cir. 1990) (Indiana law). In short, "a particular set of facts giving rise to litigation [can] justify, constitutionally [that is, under the due process clause], the application of more than one jurisdiction's laws." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985); see also *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-13 (1981) (plurality opinion).

But if the presence of an interest that might support state jurisdiction without violating the due process clause of the Fourteenth Amendment dissolved the constitutional objection to extraterritorial regulation, there wouldn't be much left of *Healy* and its cognates. Connecticut had an interest in the price of beer to its residents, but that didn't save its statute from being held to violate the commerce clause. Wisconsin had an interest in preventing its dairy farmers from obtaining "unjustified" volume discounts from food processors in Illinois, yet we invalidated the prohibition in *Dean Foods Co. v. Brancel*, *supra*, even though, while the aim of the Wisconsin law was to protect small dairy farms from the competition of large ones, the law did not discriminate against out-of-state farmers or

processors. See also *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, *supra*.

The concerns behind the due process and commerce clauses are different. *Quill Corp. v. North Dakota*, *supra*, 504 U.S. at 312-13. The former protects persons from unreasonable burdens imposed by government, including extraterritorial regulation that is disproportionate to the governmental interest. The latter protects interstate commerce from being impeded by extraterritorial regulation. And imposing a state's law on transactions in another state has a greater extraterritorial effect (and greater effect on commerce) than the state's applying its own law to suits in its courts. The difference is especially pronounced in this case, since quite apart from Indiana's consumer credit code Midwest has no intention of suing defaulting debtors in Indiana or anywhere else. Maybe someday it will bring such a suit for the *in terrorem* effect; or maybe someday one of its debtors will sue it. But that potential for state judicial interference with Midwest's transactions is trivial in comparison to the interference created by the application of Indiana's law to every loan that Midwest might make to a resident of Indiana.

The interference was with a commercial activity that occurred in another state. Each title loan that Midwest made to a Hoosier was in the form of a check, drawn on an Illinois bank, that was handed to the borrower at Midwest's loan office and could be cashed there. Illinois was also where the conditional transfer of title to the collateral was made (the handing over of the keys—the "pawn"), and where

the payments required by the loan agreement were received by Midwest. The contract was, in short, made and executed in Illinois, and that is enough to show that the territorial-application provision violates the commerce clause. Of course the loan proceeds were probably spent largely in Indiana, but the same would be true of the winnings of a Hoosier at a Nevada casino. The consequences of a commercial transaction can be felt anywhere. But that does not permit New York City to forbid New Yorkers to eat in cities in other states that do not ban trans fats from their restaurants.

Our conclusion is not altered by the fact that Midwest advertises in Indiana. If Indiana cannot prevent Midwest from lending money to Hoosiers in Illinois, it cannot prevent Midwest from truthfully advising them of this opportunity. A state may not "take the commercial speech that is vital to interstate commerce and use it as a basis to allow the extraterritorial regulation that is destructive of such commerce." *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, *supra*, 492 F.3d at 491; cf. *Dean Foods Co. v. Brancel*, *supra*, 187 F.3d at 618-19.

Nor is the location of the collateral in Indiana a critical difference between this case and the other cases that have invalidated extraterritorial regulations. It just illustrates that a transaction made in one state can have repercussions in another. A firecracker bought by an Illinoisan in Indiana could cause an injury to the purchaser in Illinois. That would allow an Illinois court, in a suit by the injured purchaser against the Indiana seller, to

apply its own law. But it would not allow Illinois to forbid Indiana to sell firecrackers to residents of Illinois in Indiana merely because Illinois forbids firms in Illinois to sell firecrackers and thus would not be discriminating against an out-of-state business. A contract can always go wrong and if it does the consequences will often be felt in a different state from the one in which the contract was made and executed.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

January 28, 2010

BEFORE: RICHARD A. POSNER, Circuit Judge
JOEL M. FLAUM, Circuit Judge
SAMUEL DER-YEGHIAYAN, District Court Judge*

No.: 09-2083	MIDWEST TITLE LOANS, INC., Plaintiff - Appellee v. DAVID H. MILLS, In His Official Capacity as Director of the Indiana Department of Financial Institutions, Defendant - Appellant
Originating Case Information:	
District Court No: 1:07-cv-01479-SEB-DML Southern District of Indiana, Indianapolis Division District Judge Sarah Evans Barker	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

*Hon. Samuel Der-Yeghiayan of the Northern District of Illinois, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST TITLE LOANS, INC.,	)	
Plaintiff,	)	
vs.	)	1:07-cv-1479-SEB-DML
JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,	)	
Defendant.	)	

CORRECTED ENTRY GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION[1]

This cause is before the Court on Plaintiff Midwest Title Loans, Inc.'s ("Midwest Title") Motion for Summary Judgment and Permanent Injunction [Docket No. 38], filed on March 24, 2008; and Defendant Judith J. Ripley's cross motion for

[1] This entry is being reissued because the pages in the previous version of the entry were out of order. This corrected entry makes no substantive changes and is identical to the entry issued on March 24, 2009. All dates related to appeals and other procedures remain unchanged.

Summary Judgment [Docket No. 42], filed on March 24, 2008. Midwest Title brought its complaint, pursuant to 42 U.S.C. § 1983, against Defendant, Judith J. Ripley, in her official capacity as Director of the Indiana Department of Financial Institutions ("IDFI"), seeking to enjoin Ms. Ripley from enforcing the Indiana Uniform Consumer Credit Code, Ind. Code § 24-4.5-1-101 to 24-4.5-7-212 (the "IUCCC"), against Midwest Title. Plaintiff filed its action following receipt of a cease-and-desist letter issued by the Supervisor of the IDFT Consumer Credit Division charging Midwest Title with being in violation of the IUCCC. Plaintiff asserts that, under Seventh Circuit and Supreme Court precedent, Defendant is forbidden by the Commerce Clause of the United States Constitution (Art. I, § 8) from applying the IUCCC extraterritorially to an Illinois Business.[2]

For the reasons detailed below, Plaintiff's Motion for Summary Judgment and Permanent Injunction is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.

Factual Background

[2] On March 24, 2008, the parties stipulated to the dismissal, with prejudice, of Count II of Plaintiff's Complaint [Docket No. 37]. That portion of the Complaint requested declaratory and injunctive relief and alleged that the IUCCC discriminated against "companies such as Plaintiff that are not affiliated with Indiana industrial loan and investment companies." Compl. at ¶ 31. We accepted that stipulation in a signed Order entered on March 25, 2008 [Docket No. 44].

Plaintiff Midwest Title is an Illinois business corporation licensed by the Illinois Department of Financial Institutions as a consumer installment loan company. Stip. at ¶ 1. Defendant Judith Ripley is chief executive and administrative officer of the Indiana Department of Financial Institutions ("IDFI"). Id. at ¶ 3.

Plaintiff issues consumer loans, which are secured by the borrower's motor vehicle, and operates exclusively from 23 separate locations throughout the state of Illinois. Plaintiff has no business locations within Indiana. Id. at ¶¶ 1-2; 4. Plaintiff does not own or lease property in Indiana and does not hold a certificate of authority or license to do business in Indiana. Id. at ¶ 9. The parties agree that no Midwest Title agent or employee solicits business *in person* in Indiana, and all reminder and collection calls to Indiana borrowers are made from Plaintiff's Illinois-based offices. Id. at ¶ 8. However, Plaintiff does solicit business from Indiana consumers via other means. See id. at ¶ 8.

The parties have stipulated to certain uncontested facts [see Docket No. 39 (Designation of Evidence in Support of Plaintiff's Motion for Summary Judgment, Pl.'s Exh. 1); Docket No. 43 (Designation of Evidence in Support of Defendant's Motion for Summary Judgment, Def.'s Exh. A)]. The following material facts are lifted from those stipulations or are otherwise undisputed:

Prior to August 2007, Midwest Title accepted in-person applications for loans from Indiana residents. To apply, an applicant drove his motor vehicle and

certificate of title to one of Midwest Title's Illinois locations. If approved, the applicant executed the necessary loan documents at the Illinois location and provided Midwest Title with a set of keys to the vehicle to secure the loan.[3] Stip. at ¶ 8(a). Midwest Title would then submit the necessary documentation to the Indiana Bureau of Motor Vehicles to have its lien noted on the borrower's certificate of title. Id. at ¶ 8(f). Loan funds were disbursed in person to the borrower at the Illinois business location. Borrowers could make principal and interest payments at any Midwest Title location in Illinois. Payments were also accepted via money order or certified check transmitted through U.S. mail, by credit card, or through Western Union. Id. at ¶ 8(a), (g).

Plaintiff admits that it engaged in advertising and solicitation activities targeting Indiana customers. Plaintiff made annual mailings to Indiana residents who had previously used its services, with the effect of soliciting repeat business from those customers. Id. at ¶ 8(b). Plaintiff further admits to advertising on television stations in Indianapolis and Terre Haute, Indiana, and on Chicago-based television and radio stations that reached Indiana residents. Id. at ¶ 8(c). In addition,

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[3] This enabled Midwest Title to engage in self-help repossession in the event of an uncured default by the borrower. Stip. at ¶ 8(a). On occasion, Plaintiff contracted with an unaffiliated third-party repossession company to repossess vehicles licensed in the state of Indiana. Prior to judicial sale, such vehicles were stored in Indiana and sold through an unaffiliated Indiana auction house. Id. at ¶ 8(h).

Plaintiff was listed in the Yellow Pages telephone directory in some Indiana communities. Id. at ¶ 8(d).

In August 2007, Plaintiff received a letter from the IDFI informing the company of a recent amendment, the "Territorial Application Provision," to the IUCCC. Stip. at ¶ 5, 10. As amended, the IUCCC imposes Indiana licensing and regulatory requirements on lenders "who are soliciting by any means and then making consumer loans to Indiana residents . . . " IND. CODE § 24-4.5-1-201. For purposes of the Territorial Application Provision, a sale, lease, or loan transaction occurs in Indiana "if a consumer who is a resident of Indiana enters into a sale, lease, or loan transaction with a creditor in another state *and the creditor has advertised or solicited sales, leases, or loans in Indiana* by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means . . ." IND. CODE § 24-4.5-1-201(d) (emphasis added). The letter noted that if a creditor violates this provision, "the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in IC 24.4.5-5.202."[4] IND. CODE § 24-4.5-1-201(8). Finally, IDFI warned Plaintiff that "failure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers." Stip. at ¶ 10. The parties agree that while the letter does not explicitly say so, "it is the position of the Director that the IUCCC does not

[4] These provisions became effective on July 1, 2007. Stip. at ¶ 10.

apply to a loan consummated in a face-to-face meeting outside Indiana unless the loan resulted from either a solicitation received by the borrower in Indiana or media advertising originating in Indiana." Id. at ¶ 11.

Upon receipt of the warning letter, Plaintiff immediately suspended offering loans to Indiana residents. Id. at ¶ 12. Plaintiff also stopped charging and collecting interest on loans made to Indiana borrowers between July 1, 2007, and Plaintiff's receipt of the letter, and refunded all previously made payments of interest on the covered loans. Id. at ¶ 13.

Plaintiff extended a total of 2,054 loans to Indiana borrowers in 2006, which represented approximately 9 percent of Plaintiff's business. Id. at ¶ 6, Pl.'s Br. in Supp. at 2. The interest rate charged by Plaintiff exceeds the 36 percent per annum limit allowed by the IUCCC, Stip. at ¶ 4; therefore, the loans do not comply with Indiana law.

Legal Analysis

I. Standard of Review

Summary judgment is appropriate when the record establishes that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-

moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding whether genuine issues of material fact exist, the court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. See id. at 255. However, neither the "mere existence of some alleged factual dispute between the parties," id. at 247, nor the existence of "some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), will defeat a motion for summary judgment. Michas v. Health Cost Controls of Illinois, Inc., 209 F.3d 687, 692 (7th Cir. 2000).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the burden of proof may discharge its burden by showing an absence of evidence to support the non-moving party's case. Id. at 325.

When the issues presented are purely questions of law, as the case at bar, summary judgment standards nonetheless apply. See Oneida Tribe of Indians of Wisconsin v. State of Wisconsin, 951 F.2d 757, 760 (7th Cir. 1991). Courts are often confronted with cross-motions for summary judgment because Rules 56(a) and (b) of the Federal Rules of Civil Procedure allow both plaintiffs and defendants to move for such relief. "In such situations, courts must

consider each party's motion individually to determine if that party has satisfied the summary judgment standard." Kohl v. Ass'n. of Trial Lawyers of Am., 183 F.R.D. 475 (D.Md.1998). While cross motions for summary judgment may lead to a judgment without trial, the standard for determining whether summary judgment should issue is unchanged from that which applies when only a single party has moved for the relief.

II. Dormant Commerce Clause:

The Territorial Application Provision of the IUCCC provides that Indiana law applies to any transaction in which "a consumer who is a resident of Indiana enters into a sale, lease, or loan transaction with a creditor in another state *and the creditor has advertised or solicited sales, leases, or loans in Indiana* by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means . . ." IND. CODE § 24-4.5-1-201(d) (emphasis added). Plaintiff contends that this amendment violates the Commerce Clause of the United States Constitution by attempting to impose an extraterritorial regulation on commerce conducted lawfully in Illinois. Compl. at 8-9. Plaintiff claims that, because Indiana is attempting to apply the IUCCC to contracts made wholly outside the state, the Territorial Application Provision is *per se* invalid. Pl.'s Br. in Supp. at 8-15. Plaintiff seeks both declaratory and injunctive relief.

Defendant rejoins that the Indiana statutory scheme is not triggered unless a lender affirmatively targets Indiana consumers by advertising or

soliciting in Indiana, and that, because Plaintiff solicits business across state lines, the loans in question are not transacted "wholly" within Illinois. Def.'s Br. in Supp. at 16. Defendant argues that the purpose of the Territorial Application Provision is to "protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit," and that a socially protective legislative purpose, as opposed to economic protectionism, is permissible, even if it imposes an incidental burden on interstate commerce. Id. at 18. Defendant further maintains that the facts stipulated by the parties "readily acknowledge a number of [Midwest Title's] activities which have a nexus with Indiana." Id. at 8. Specifically, Defendant asserts that by directing mailings to Indiana consumers, advertising on radio and television stations located in Indianapolis and Terre Haute, and paying to have its name listed in the Yellow Pages in Indiana, "Midwest Title has invoked Indiana's consumer protection laws." Id. at 9. Defendant thus urges us to apply the balancing test of Pike v. Bruc Church, 397 U.S. 137 (1970), to Plaintiff's Dormant Commerce Clause challenge and uphold the Territorial Application Provision of the IUCCC.

The United States Constitution allocates to Congress the power to "regulate Commerce . . . among the several States." U.S. Const. Art I, § 8. Implicit in Congress's exclusive authority over interstate commerce is a restriction on states from doing the same. See New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988). This prohibition is commonly referred to as the Dormant Commerce

Clause. Intended to prevent economic protectionism, the Dormant Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism . . . . " Id. at 273-74.

Laws motivated by simple economic protectionism are *per se* invalid. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Under certain circumstances, however, a statute which merely burdens interstate commerce in the course of advancing a legitimate state interest may be upheld if the state interest outweighs the burden on interstate commerce. Pike, 397 U.S. 137.

A. The Extraterritoriality Principle:

States may also run afoul the Commerce Clause by seeking to regulate commerce which takes place "wholly" outside their own state. Healy v. Beer Inst., 491 U.S. 324, 332 (1989) ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside the state's borders is invalid under the Commerce Clause."); Dean Foods Co. v. Brancel, 187 F.3d 609, 614 (7th Cir. 1999) (stating that it is "a fact well known" that extraterritorial legislation is barred by the federal constitution); Nat'l Solid Waste Mgmt. Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995) ("[T]he Commerce Clause constrains a state from projecting its economic legislation onto commerce wholly occurring in its sister states."). The parties'

dispute, appropriately framed, is whether the loans offered by Midwest Title constitute commerce "wholly outside" the state of Indiana, thus implicating the Dormant Commerce Clause.[5]

In support of its argument, Plaintiff cites Dean Foods, stating that "Indiana's aggressive effort to assert the IUCCC extraterritorially to govern Midwest Title's business activities in Illinois cannot be harmonized" with that decision. Pl.'s Br. in Supp. at 9.

Dean Foods involved a Wisconsin law that attempted to prohibit an Illinois milk processor from paying price premiums to high-volume Wisconsin milk producers. Prior to the enactment of the Wisconsin law, the Illinois processor hired haulers to go to Wisconsin, purchase Wisconsin milk, and transport the milk to Illinois for processing. Dean Foods, 187 F.3d at 611-12. When the law passed, the Illinois processor altered its operations in an effort to avoid the law by requiring Wisconsin milk producers to transport their own milk to Illinois, where the Illinois processor would agree to purchase it and accept delivery. Id. Wisconsin attempted to enforce its new pricing regulations on the transactions

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[5] Notably, a few commentators have questioned whether the Extraterritoriality Principle is appropriately considered an outgrowth of the Commerce Clause. See Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial Legislation, and the Concerns of Federalism*, 55 ME. L. REV. 467 (2003); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865 (1987).

despite the Illinois' processors' attempts around it. Dean Foods filed an action in federal court, arguing that Wisconsin's actions amounted to unconstitutional extraterritorial interference.

Even though Dean Foods maintained a sales office in Wisconsin, mailed business solicitations to Wisconsin customers, and had its representatives "enroll" Wisconsin producers in the new milk purchase program in Wisconsin, id. at 618-19, the Seventh Circuit nonetheless held that the actual milk sales took place wholly outside Wisconsin, no contracts were formed in Wisconsin, and no commitment bound the Illinois processor and Wisconsin producers before the milk was accepted in Illinois. Id. at 619. The Seventh Circuit concluded that mere contacts with another state are not enough to overcome the ban on extraterritorial legislation. Id. at 618-19. Rather, an element of the actual contract formation must occur within a state for that contract to come within the purview of the state's laws. Id. at 620.

The Dean Foods analysis focused particularly on the elements of contract formation in determining whether transactions occurred wholly within the state of Illinois. The court indicated that the crucial contacts are those which form a binding agreement: offer and acceptance of specific terms. Id. at 617, 619-20. If an offer occurs in one state and an acceptance in another, both states' laws may apply. Id. at 620. However, where the entire transaction occurs wholly within one state, only that state's laws may apply. Id. Advertising, and even preliminary

negotiations in another state, are not enough to invoke that state's laws. Id. at 619.

Other courts have applied a similar analysis. The Fourth Circuit recently considered a case, Carolina Trucks & Equip. Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484 (4th Cir. 2007), where South Carolina sought to regulate transactions in which residents of South Carolina traveled to a Georgia dealership to purchase trucks. The offending Georgia dealership was listed in the Yellow Pages in South Carolina, advertised in regional trade publications, and mailed brochures to individuals in South Carolina. Id. at 487. All actual sales transactions, however, occurred on the dealership lot in Georgia. Id. The court held that advertising in South Carolina was insufficient to subject the challenged transactions to South Carolina law, stating that "[o]ne state may not 'project its legislation' into another." Id. at 489 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)). The court explicitly rejected the argument that the transactions took place partially in South Carolina by virtue of the advertising solicitations sent there. Id. 490-91.[6]

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[6] In the present case, Defendant alternatively argues that elements of the loan agreement are performed in Indiana because Indiana consumers may mail their payments from Indiana and have an ongoing relationship with Midwest Title. Def.'s Reply to Subm. at 5, 10-11 [Docket No. 55]. We find this argument unavailing. We doubt, for instance, the Fourth Circuit's analysis in Carolina Trucks would have substantially changed if South Carolina customers financed their truck purchases and mailed payments from their home state.

Most recently, in Quick Payday Inc. v. Stork, 549 F.3d 1032 (10th Cir. 2008), the Tenth Circuit considered the application of a Kansas regulation on an out-of-state payday loan company who solicited business in Kansas via the internet. Quick Payday is of particular relevance to our case, because the Kansas Office of the State Bank Commission sought to apply the KUCCC based on a territorial application provision, KAN. STAT. ANN. § 16a-1-201(1)(b), which is remarkably similar to the Indiana provision at issue in our case.[7] The solicitation in question involved the lender web site, which could be accessed by Kansas residents in Kansas, as well as emails sent directly to prospective borrowers in Kansas.

In Quick Payday, Tenth Circuit adopted the view that "the borrower's physical location at the time of the solicitation is controlling." 549 F.3d at 1308. The Defendant in our case vigorously maintains that this language indicates that the solicitation is part of a loan transaction, and that if a consumer is within Indiana when a solicitation resulting in a loan is received, the IUCCC applies. Def.'s Reply to Subm. at 2.

In taking that position, Defendant misconstrues the Tenth Circuit's holding as it applies to the case at bar. In Quick Payday, a prospective borrower could view the soliciting web page or email, and

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[7] KAN. STAT. ANN. § 16a-1-201(1)(b) states that the KUCCC applies if "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means."

within a few electronic clicks enter into a loan agreement with the out-of-state lender, all while remaining at a computer terminal in Kansas. 549 F.3d at 1304. Prospective borrowers did not need to travel to another state to get an offending loan; this is a distinguishing fact from the present case. A close reading of Quick Payday reveals that both the Tenth Circuit and State of Kansas reflected this distinction, conceding that the advertisement alone *did not* trigger application of the Kansas statute. Rather, the controlling factor was the location of the borrower when the loan was actually contracted for. Id. at 1308. The Kansas Office of the State Bank Commission specifically conceded that it would not attempt to apply the Kansas statute to situations where a Kansas consumer left Kansas to acquire a loan. Id.[8]

In the present case, there is no doubt that Midwest Title solicited business in Indiana. However, it is equally clear that no credit agreements were finalized within Indiana.[9] All

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[8] "[The Kansas Office of the State Bank Commission's] brief in this court further clarified . . . that '[t]he [KUCCC] regulates the conduct of Internet payday lenders who choose to make payday loans with Kansas consumers *while they are in Kansas*.' And referring to Quick Payday's hypothetical 'about a Kansas consumer leaving Kansas to acquire a payday loan' it declared that 'the OSBC would not try to apply the [KUCCC] to loans that occur under th[ose] circumstances.' We adopt this reasonable interpretation of the statute by those charged with its enforcement." Quick Payday, 549 F.3d at 1308 (emphasis in original) (internal citations omitted).

[9] Defendant at times seems to confuse a state's legislative reach with a state's judicial jurisdiction. "Contacts" analysis certainly

customers had to physically present themselves at a Midwest Title location in Illinois in order to enter into a binding loan agreement. Just as a Yellow Pages advertisement would not create a loan agreement, it is spurious to argue that a loan has not been transacted until a consumer mails in his payments from his home state. In the present case, no loan agreement came into existence until an Indiana customer traveled to Illinois and obtained a loan at a Midwest Title store. That transaction at that point was completed and it clearly occurred within Illinois where loan documents were signed

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applies when considering the jurisdiction of a state's courts over a party or matter. See International Shoe Co. v. Washington, 326 U.S. 310 (1945). There is no question that Midwest Title, by virtue of its contacts with the forum and activity injected into Indiana, would be subject to the jurisdiction of Indiana courts should a suit against it be filed there. However, the reach of a court's jurisdiction does not determine the territorial bounds of a state legislature's laws (nor does it necessarily even determine the state law to be applied by the court). A state is generally prohibited from asserting legislative power over parties and activities wholly beyond it's borders. See Gerling Global Reinsurance Corp. of Am. v. Gallagher, 267 F.3d 1228, 1236-37 (11th Cir. 2001) (explaining the similarities and distinctions between judicial and legislative jurisdiction, and holding that life insurance policies issued outside the state by out-of-state entities were not subject to Florida legislative regulation). Applying the Seventh Circuit's analysis in Dean Foods, the contacts in this case are insufficient to give Indiana legislative jurisdiction over the loan contracts in question.

and Midwest Title had tendered a loan payment in exchange for a promise to repay.[10]

Pursuant to established Seventh Circuit precedent and consistent with conclusions reached by other circuits, we hold that the loan transactions at issue in this case occurred wholly within the state of Illinois.

B. Invalidity of Extraterritorial Statutes:

The IDFT correctly argues that, even where a law is held to burden interstate commerce, the Seventh Circuit applies the two-tiered analysis of Pike. See Pike, 397 U.S. at 142; Def.'s Br. in Supp. at 15 (citing Alliant Energy Corp v. Bie, 336 F.3d 545, 546 (7th Cir. 2003)). Pursuant to that test, a statute which facially or directly discriminates against or regulates interstate commerce is subject to strict scrutiny. Alliant Energy, 336 F.3d at 546. If a statute's effects on interstate commerce are only incidental, or are direct but applied evenhandedly, the Pike balancing test balances the burden on interstate commerce against the state's legitimate policy concerns. Id.

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[10] Other cases Defendant cites are similarly distinguishable. In each of the Aldens cases, an Illinois mail-order company was required to comply with the consumer credit laws of other states when its customers ordered merchandise on credit through the Aldens catalog. See Aldens, Inc. v. Ryan, 571 F.2d 1159 (10th Cir. 1978); Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977); Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975). However, in each of these cases, the customer was located in his or her home state when he or she ordered merchandise and entered into the purchase contract. Under the Dean Foods analysis, such transactions could not be held to have occurred wholly outside the customer's state.

Alliant Energy rejected the premise that "precedent mandates the *per se* invalidation of every state regulation that has any extraterritorial effect whatsoever." Id. at 546.[11] In fact, several cases have specifically noted that, while economic protectionism is *per se* invalid, other motivations may trigger a balancing of interests. See CTS Corp., 481 U.S. at 93 (rejecting the contention that Indiana has no interest in protecting its citizens from unfair business dealings); Alliant Energy, 336 F.3d at 549 (acknowledging that a state has an interest in protecting the welfare of its citizens); Morley-Murphy v. Zenith, 142 F.3d 373, 379 (7th Cir. 1998) ("[State courts] are well aware that the Supreme Court has held that certain assertions of extraterritorial jurisdiction violated the dormant Commerce Clause.") (emphasis added). However, although the Supreme Court has held that certain extraterritorial *effects* of statutes are permissible, e.g., CTS, 481 U.S. at 93 (holding that a statute that regulated internal matters but had external effects was constitutionally valid), statutory provisions that

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[11] Initially, this statement appears to be in conflict with Supreme Court precedent. In Edgar v. MITE, 457 U.S. 624 (1982), Justice White, writing for the Court, suggested that all extraterritorial regulation should be *per se* invalid. The Seventh Circuit noted that "a majority of justices agreed that the two tiered [Pike] test was the appropriate approach; however, they didn't agree on how the case before them fit that test. Read in this light, the opinion suggests that extraterritorial regulations are subject to the traditional interstate commerce analysis." Alliant Energy, 336 F.3d at 548; see also CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) (noting that "as the plurality in MITE did not represent the views of a majority of the Court, we are not bound by its reasoning").

specifically seek to regulate extraterritorial conduct are a different matter. See Alliant Energy, 336 F.3d at 548-49 (indicating that a statute directly regulating extraterritorial activity is unquestionably invalid, but applying Pike balancing to statutes with indirect effects on extraterritorial commerce).

The present case does not involve a statute which merely burdens interstate commerce or has extraterritorial *effects*. It concerns a statutory provision which, by design, directly regulates extraterritorial activity. Even according to Defendant's primary authority, Alliant Energy, such a statute is *per se* invalid. 336 F.3d at 548-49 (holding that "direct extraterritorial interference" or regulation is "unquestionably *per se* invalid," but reserving that a statute may be balanced against state interests where the statute "regulates internal matters and the regulations have external effects" or where the statute has "indirect effects on extraterritorial commerce"); see also Healy, 491 U.S. at 336 ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid . . . ."); Nat'l Solid Waste Mgmt. Ass'n, 63 F.3d at 658-60 (indicating that a statute is invalid where it has the "practical effect" of controlling commerce wholly outside the state). Cf. Ill. Rest Ass'n v. City of Chicago, 492 F. Supp. 2d 981 (holding that despite a city ordinance's extraterritorial effects, it was valid because it was aimed at a sufficiently local problem).

A state may not directly regulate conduct or events beyond its own borders, no matter its

motivation for doing so. See Bigelow v. Virginia, 421 U.S. 809, 824-25 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.") Here, the territorial application provision, as interpreted by the Defendant, purports to apply the IUCCC to consumer loan transaction occurring wholly within the state of Illinois. Despite Defendant's attempt to paint the loan transactions as occurring partially in Indiana based on the reach of the solicitations issued to potential customers in this state, it is clear that the statute does not regulate the conduct of Midwest Title within the state of Indiana; it seeks to regulate Midwest Title's lending activities in Illinois.[12]

Were we to adopt the Defendant's view we would be giving the proverbial *carte blanche* to states to impose their diverse regulatory schemes on any commercial activity which affects any other state's

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[12] The Supreme Court also noted in CTS Corp. that statutes are routinely held invalid if they "adversely affect interstate commerce by subjecting activities to inconsistent regulations." 481 U.S. at 88; see also Healy, 491 U.S. at 336-37 (indicating that the Commerce Clause is designed to protect against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state"). This problem is readily apparent in the present action. Do the Plaintiff's title loans need to adhere to Indiana law, or Illinois law? The Defendant argues that a loan made to an Indiana consumer must follow Indiana law, even if the loan is transacted in Illinois. However, Illinois law indicates that a title lender in Illinois need only comply with the Illinois Consumer Installment Loan Act. 205 ILL. COMP. STAT. 670/9; ILL. ADMIN. CODE tit. 38 §§ 110.320 to .430.

interests and satisfies a rudimentary minimum contacts test. Just as "citizens do not carry their home state's laws with them wherever they go," Warriner v. Stanton, 475 F.3d 497, 504 (3d Cir. 2007), state laws surely should not be permitted to travel wherever someone would have them go.

III. Permanent Injunction

When a permanent injunction is requested at summary judgment, a court must consider whether (1) the plaintiff has succeeded on the merits; (2) remedies at law, such as monetary damages, are inadequate to compensate for that harm; (3) an injunction is warranted after balancing the hardship to plaintiff against potential hardship to the defendant in granting the injunction; and (4) the public interest does not argue against granting the injunction. Collins v. Hamilton, 349 F.3d 371 (7th Cir. 2003). A violation of constitutional rights under the Commerce Clause constitutes an irreparable injury for the purposes of considering an injunction. Kendall-Jackson Winery v. Branson, 82 F. Supp. 2d 844, 878 (N.D. Ill. 2000); Gov't Suppliers Consolidating Serv., Inc. v. Bayh, 734 F. Supp. 853, 864 (S.D. Ind. 1990). In addition, Midwest Title's losses are not recoverable against the State because the 11th Amendment's doctrine of sovereign immunity bars suits for money damages against a state in federal court. Wynn v. Southward, 251 F.3d 588, 592 (7th Cir. 2001).

Balancing harm to the parties and considering the public interest "largely overlap" when a Plaintiff sues a government entity to enjoin enforcement of a

statute. Prof'l Towing & Recovery Operators fo Ill. v. Box, 2008 U.S. Dist. LEXIS 100002, 45 (N.D. Ill. 2008). While the public has an interest in enforcing laws that promote safety or welfare, the public has no cognizable interest in enforcing laws that are unconstitutional. See id. at 45-46. Indeed, the public interest is best served by preventing unconstitutional enforcement. Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."); Preston v. Thompson, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.").

This court is not unsympathetic to Indiana's policy interests against the predatory lending practices seemingly prevalent in the consumer loan industry. The loan terms offered by Midwest Title appear to us to at least approach being abusive and unconscionable. However, it is the domain of Illinois to regulate its own consumer lending industry, as Indiana has the power and responsibility to regulate its own consumer lending industry. As far back as 1935, in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), when New York attempted to project price regulation upon milk producers in Vermont to ensure an adequate supply of milk for New York citizens, despite the worthy social policy behind the regulation, the Supreme Court ruled: "One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories . . . the legislature of Vermont and not that

of New York must supply the fitting remedy." Id. at 524. So it is, seventy-five years later, between Indiana's and Illinois's respective economic interests: each is limited to managing and regulating its own activities.

IV. Conclusion:

For the foregoing reasons, IND. CODE § 24-4.5-1-201(d) is hereby ruled unconstitutional as applied to Midwest Title to regulate title loans made wholly in the state of Illinois; and Midwest Title is entitled to a permanent injunction against IDFT's application of the IUCCC to loans made wholly in the state of Illinois to Indiana residents. Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED. Final judgment shall be entered accordingly.

IT IS SO ORDERED.

Date: 04/03/2009

SARAH EVANS BARKER,
JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST TITLE LOANS, INC.,	)	
Plaintiff,	)	
vs.	)	1:07-cv-1479-SEB-DML
JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,	)	
Defendant.	)	

JUDGMENT

The Court, having contemporaneously granted Plaintiff's Motion for Summary Judgment and Permanent Injunction and denied Defendant's Motion for Summary Judgment, now, pursuant to Rule 58(a), enters judgment in favor of Plaintiff and against Defendant.

IT IS SO ORDERED.

Date: 3/24/2009

SARAH EVANS BARKER,
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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MIDWEST TITLE LOANS, INC.,	:	
Plaintiff,	:	
vs.	:	1:07-cv-1479-SEB-DML
JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,	:	
Defendant.	:	

JOINT STIPULATION OF FACTS

Plaintiff Midwest Title Loans, Inc. and defendant Judith Ripley, in her official capacity as the Director of the Indiana Department of Financial Institutions, submit this Joint Stipulation of Facts, and stipulate as follows:

1. Plaintiff Midwest Title Loans, Inc. ("Midwest Title") is an Illinois business corporation, licensed by the Illinois Department of Financial Institutions as a consumer installment loan company. Midwest Title makes loans (the "Loans") from 23 stores located in Illinois.

2. Midwest Title maintains no stores in Indiana. Midwest Title only makes Loans in-person and only makes loans to borrowers who visit its Illinois stores.

3. Judith Ripley (the "Director") serves as the chief executive and administrative officer of the Indiana Department of Financial Institutions (the "Department") and is responsible for the administration of the policies established for the Department by or pursuant to applicable Indiana legislation. The Director exercises managerial control over the work of the Department, including the Supervisor of the Division of Consumer Credit (the "Supervisor") as well as other division supervisors, deputy directors, examiners and administrative personnel.

4. Midwest Title provides Loans which are secured by the borrower's motor vehicle. Midwest Title will lend up to approximately 50% of the estimated wholesale value of the vehicle which secures the Loan. Contract terms provide that the Loans are payable in equal monthly installments over a period of 12, 18 or 24 months. Annual percentage rates of interest on the Loan are typically approximately 300% (but may be more or less) compared with the 36% per annum rate limitation under the Indiana Uniform Consumer Credit Code ("UCCC"). The Loan documents expressly call for the application of the law of the state in which the contract is executed.

5. In mid-August 2007, Midwest Title received a letter from the Supervisor (the "Letter"), a true,

accurate and admissible copy of which is attached hereto as Exhibit 1.

6. Midwest Title made Loans to Indiana residents from 1999 through mid-August 2007, when it received the Letter. During 2006, Midwest Title made 2,054 Loans to Indiana residents. For the period in 2007 prior to receipt of the Letter, Midwest Title made 907 Loans to Indiana residents.

7. Midwest Title maintains no stores or employees in Indiana and only makes Loans in-person to applicants (including applicants residing in Illinois and other states including, until receipt of the Letter, Indiana) who visit one of its Illinois stores and bring both their motor vehicle and their motor vehicle title to the Illinois store. Midwest Title contracted with unaffiliated third parties in Indiana to effect repossession, storage of vehicles and auctioning or other sales to dispose of repossessed vehicles. It also contracted with advertisers, including television stations based in Indiana, to advertise its financial products to Indiana residents.

8. Before Midwest Title's receipt of the Letter, Midwest Title's contacts with the State of Indiana were the following:

(a) Midwest Title made Loans, at its Illinois stores, to Indiana residents who applied for Loans at its Illinois stores. To obtain a Loan, an Indiana resident needed to bring his or her motor vehicle and the motor vehicle title to one of Midwest Title's Illinois stores and apply in person for the Loan. If

approved for a Loan, the applicant needed to execute the necessary Loan documents at the Illinois store and provide Midwest Title with a set of keys to the vehicle securing the loan to assist the unaffiliated repossession companies with which Midwest contracted in effecting self-help repossession of the vehicle in the event of a default that does not get cured by the borrower after receiving written notice of default from Midwest Title. The Loan funds were disbursed at the Illinois store in the form a check, drawn on an Illinois bank that could be cashed without charge at the store (or could be cashed elsewhere). Midwest Title did not make Loans to borrowers who were not physically present at one of Midwest Title's Illinois stores. A true and correct copy of the blank form of Loan application currently used by Midwest Title is attached hereto as Exhibit 2. A true and correct copy of the blank form of the Installment Loan and Security Agreement used by Midwest Title (the "Note") is attached hereto as Exhibit 3. The Note expressly provides that the Note will be governed by the laws of the state in which it is executed.

(b) Midwest Title made annual mailings to past customers, including Indiana residents, thanking them for their business and reminding them of the availability of Loans from Midwest Title. These mailings were addressed to individual Indiana residents. One of the purposes of these mailings was to solicit repeat business from previous borrowers.

(c) Midwest Title advertised on television stations in Indianapolis and Terre Haute, Indiana.

It also advertised on television and radio stations in Chicago which reach Indiana residents.

(d) Store employees in Illinois may have caused Midwest Title to have its name and Illinois phone number and/or an 800 number included in Yellow Pages listings in Indiana.

(e) Midwest Title made available an 800 number staffed by personnel physically located outside Indiana. By calling the 800 number, prospective borrowers, including Indiana residents, could obtain information about the Loans and how to apply for a Loan. However, prospective borrowers could not apply for or obtain Loans over the telephone, through the mail, by fax, over the Internet, or by any means other than that described in subparagraph 8(a) above.

(f) After making a Loan to an Indiana resident, Midwest Title would generally submit to the Indiana Bureau of Motor Vehicles (the "BMV") the documents necessary to have Midwest Title's lien noted on the borrower's motor vehicle title and would then hold physical possession of the certificate of tile upon receipt from the BMV.

(g) Borrowers could make principal and interest payments in person at Midwest Title's Illinois stores or pay from any location, including Indiana, by money order or certified check transmitted through the U.S. mail or other means, by credit card or through Western Union. No payments are accepted by Midwest Title in Indiana.

(h) From its Illinois offices, Midwest Title made reminder and collection calls to Indiana borrowers. In the event of a default of at least thirty days, Midwest Title paid an unaffiliated third party repossession company to effect repossession of the vehicle securing the Loan from wherever the vehicle may be located, including within Indiana, and obtained a new title from the BMV showing Midwest Title as the owner of the vehicle. Repossessed Indiana motor vehicles are kept in Indiana prior to sale and are sold through an unaffiliated Indiana auction house. Midwest Title has not brought any lawsuits to collect deficiency judgments, and has not filed any actions in federal or state courts in Indiana, excepting the instant lawsuit.

9. Other than taking title to the motor vehicles in connection with the repossession, storage or sale of collateral securing the Loans, Midwest Title does not own or lease property in Indiana. Midwest Title does not hold a certificate of authority or license to do business in Indiana. Midwest Title has not had and does not have agents or employees who solicit business in person in Indiana. Midwest Title's loan agreements are negotiated and executed in Illinois but other contractual relationships, including contracts for advertising and agreements with repossession and/or auction companies, are made with parties who may be located in Indiana. Midwest Title never enters into such contracts in Indiana. Midwest Title executes in Illinois for applications for certificates of title for vehicles it has repossessed and then causes to be auctioned in Indiana as the owner of the vehicle.

10. The Letter sent by the Supervisor to Midwest Title stated that, as amended effective July 1, 2007, Ind. Code § 24-4.5-1-201 "requires lenders who are soliciting by any means and then making consumer loans to Indiana residents to be licensed" under the Indiana UCCC. The Letter quoted Ind. Code § 24-4.5-1-201(8) as follows: "If a creditor has violated the provisions of this article that apply to the authority to make consumer loans (IC 24-4.5-3-502), the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in IC 24-4.5-5.202." The Letter further stated that: "Failure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers."

11. While the Letter does not explicitly say so, it is the position of the Director that the Indiana UCCC does not apply to a loan consummated in a face-to-face meeting outside Indiana unless the loan resulted from either a solicitation received by the borrower in Indiana or media advertising originating in Indiana. In the instant case, it is the position of the Director that the Indiana UCCC only applies to Loans resulting from a solicitation received by the borrower in Indiana by any means, including direct solicitation letters from outside the State, Yellow Pages listings in Indiana and advertisements on Indiana (but not Illinois) television stations.

12. Midwest Title suspended offering Loans to Indiana residents immediately after receiving the Letter.

13. Midwest Title discontinued charging or collecting any interest on Loans to Indiana borrowers made between July 1, 2007 and Midwest Title's receipt of the Letter (the "Covered Loans") and refunded all previous payments of interest on the Covered Loans. True, correct and admissible copies of correspondence on this issue between Midwest Title and the Department are attached hereto as Exhibit 4.

14. In response to the 2007 amendment to Ind. Code § 24-4.5-1-201 and the Department's notice of enforcement of the Indiana UCCC against Midwest Title, Midwest Title suspended offering Loans to any Indiana residents and waived all finance charges on the Covered Loans.

15. Midwest Title has lost revenue as a result of this suspension of business with Indiana borrowers.

16. Midwest Title continues to accept payments of principal and interest on Loans to Indiana borrowers made prior to July 1, 2007 and continues to accept principal payments on Covered Loans.

17. This is a partial Stipulation in that the parties anticipate the submission of at least a limited amount of additional designated evidence when cross-motions for summary judgment are filed. This agreement shall not constitute an admission by either party that any stipulated fact set forth herein, or otherwise submitted, is relevant or otherwise admissible.

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